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Voluntary Peer Review of Competition Law and Policy: Philippines Overview

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This Voluntary Peer Review of Competition Law and Policy has been prepared in response to the request of the Intergovernmental Group of Experts as stated in the Report of the Intergovernmental Group of Experts on Competition Law and Policy on its thirteenth session (TD/B/C.I/CLP/25). The opinions expressed in this Voluntary Peer Review are those of the peer reviewers and do not necessarily reflect the views of the United Nations Secretariat.

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This report was prepared for UNCTAD by Deunden Nikomborirak and Bob Weymouth. The substantive backstopping and review of the report was the responsibility of Hassan Qaqaya and Dongryeul Shin. UNCTAD would like to acknowledge valuable assistance provided by Geronimo L. Sy, Assistant Secretary of the Department of Justice of the Philippines (Office for Competition (OFC)). UNCTAD would also like to acknowledge the staff of the OFC who contributed during the preparation of this report.

Introduction

1. This report has been developed based on material current at March 2014, several months after the fact finding mission to the Philippines. Legislative updates after the time of visit have been taken up in the report.

I. Foundations and history of competition policy

2. The Philippines is a sovereign State in South-East Asia in the Western Pacific Ocean. It is an archipelago comprising 7,107 islands, with a population of more than 103 million people. The country is classified as a lower-middle income country by the World Bank with a gross domestic product (GDP) per capita of \$2,701 in 2012 (current price). Currently, the country is enjoying an unusual period of political stability that helps boost economic growth. In 2012, the country's GDP grew at the rate of 6.8 per cent – well above the Association of Southeast Asian Nations (ASEAN) region's 5.3 per cent – despite the economic difficulties in the United States of America and the European Union.

3. However, the country's income inequality is among the highest in Asia as wealth is concentrated in the hands of a few families. The current Government is implementing large-scale projects, such as the distribution of cash transfers, to alleviate the problem. Yet, a major restructuring of the economy will be required to ensure that the prospective economic growth and prosperity will trickle down to the poor rather than concentrated among the few rich.

4. The Philippines adopts relatively liberal trade and investment policies. Import duties on most goods have been reduced to zero under the ASEAN Free Trade Agreement, and the Foreign Investment Act (RA 7042, 1991, amended by RA 8179, 1996) liberalized the entry of foreign investment into the Philippines. Under the Act, 100 per cent foreign equity may be allowed in all areas of investment except those reserved for Filipinos by mandate of the Philippine Constitution¹ and existing laws.

5. While trade liberalization may help promote competition from imported products, for certain goods, high logistic costs can hinder import penetration. Although high prices (from alleged collusion) may be attractive to importers, dominant local manufacturers can easily cut prices to fend off competition from imported products because of clear cost advantage.

6. As an island State, moving products or services from one island to another is likely to be costly, rendering the domestic market highly fragmented, and hence particularly vulnerable to capture by regional monopolies.

7. Moreover, foreign investment restriction in public utility services mandated by the Constitution also contributes to market concentration in key service sectors such as telecommunications, energy and transport. While anti-trust law has long been a part of the Philippines legal system, starting with the old penal code administered by the Spanish

¹ Article XII National Economy and Patrimony, section 11: No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines, at least sixty per centum of whose capital is owned by such citizens.

regime in the early 1900s, there is no doubt that the country is in need of a comprehensive competition law and policy.

8. Despite the fact that the 1987 and still current Philippine Constitution prohibits monopolies,² the country still does not have a comprehensive competition law. Various competition-related clauses can be found in the penal code, the civil code, the price control law and several sector-specific laws. The substantive provisions found in these laws are by no means comprehensive. For example, there are no provisions governing the abuse of dominance, although the word "monopolization" appears in various provisions under several laws. There is also no merger regulation for anti-trust purposes.

9. The recognition of a need for a comprehensive competition law is long standing.

10. The time for the promulgation of a competition law may be ripe for several reasons. First, there is clear political commitment at the highest level: the President of the Philippines called for an anti-trust law to fulfil the constitutional guarantee of fair competition in his first state of the nation address in July 2010. The creation of the country's first Competition Authority, the Office for Competition, under the Department of Justice (DOJ) under executive order No. 45 issued in the following year is a clear testimony of the commitment. Second, the competition bill has gained wide support from the business and academic community as well as key members of the legislature.

II. The legal framework

Introduction

11. The Philippines has a history of laws dealing with competition issues going back to the Spanish legal regime. Current laws dealing with monopolies go back to 1925 and restraint of trade provisions date back to 1932 in the Revised Penal Code. The current constitution with reference to control of monopolies was established in 1987 although the same provisions are similarly found in the previous constitutions.

A. Current laws

12. The main legislation dealing with competition issues has been summarized as:

"The 1987 Constitution, Article XI, Sections 1,6,11,19 and 22;

The Revised Penal Code (Act No. 3815), Article 186 (further amended by Republic Act (R.A.) No 1956), further integrated by Section 1, Paragraph d (5) of the Republic Act No. 7080, which defines and penalizes the crime of plunder; and

The New Civil Code (R.A. No. 386), Article 28 and Act No. 3247 ("The Act to Prohibit Monopolies and Combinations in Restraint of Trade"), Section 6, on the recovery of damages.

In addition, special laws and statutes address competition related practices in specific sectors, such as the Price Act (R.A. No. 7581), Section 5; the Cooperative Code (R.A. No. 6938), Article 8; and the Downstream Oil Industry Deregulation Act of 1998

² Article XII, sections 13 and 19: "The State shall pursue a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity and shall regulate or prohibit monopolies when the public interest so requires".

(R.A. No. 8479), Rule III, Section 9 and Rule IV, Section 15. The Corporation Code (Act No. 68) provides for merger control."

13. While this description may be accurate and comprehensive, it does nothing to explain the nature and coverage of the competition laws in the Philippines. There is no unified law or enforcement regime that deals with all of the anticompetitive behaviours that may impact on consumers.

14. At the heart of the competition regime is the article 186. It is a provision that provides for criminal penalty at the lower end of the scale (ranging from 6 months and 1 day to 2 years and 4 months imprisonment) and a fine that can only be described as ineffective. The penalty range of 200 to 6,000 pesos was set in 1932 and has never been upgraded. The penalty is not a likely deterrent (the range expressed in United States dollars is approximately \$15 to \$150).

15. Unlike some of the other provisions addressed in this paper, there is no administrative penalty regime contained within article 186.

Act to Prohibit Monopolies and Combinations in Restraint of Trade (Act No. 3247) of 1 December 1925

16. Act No. 3247 is the oldest competition law that penalizes monopolies and combinations in restraint of trade and provides for treble damages in civil actions:

"Section 6. Any person who shall be injured in his business or property by any other person by reason of anything forbidden or declared to be unlawful by this Act, shall recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

Amending the Law Prescribing the Duties and Qualifications of Legal Staff in the Office of the Secretary of Justice (RA No. 4152) of 20 June 1964

17. This is a law that vests the Secretary of Justice with legal and enforcement duties in competition. Section 2: The Secretary of Justice shall:

"study all laws relating to trusts, monopolies and combinations; to draft such legislation as may be necessary to up-date or revise existing laws to enable the Government to deal more effectively with monopolistic practices and all forms of trusts and combination in restraint of trade or free competition and/or tending to bring about non-competitive prices of articles of prime necessity; to investigate all cases involving violations of such laws; and to initiate and take such preventive or remedial measures, including appropriate judicial proceedings, to prevent or restrain monopolization and allied practices or activities of trusts, monopolies and combinations."

The Price Act (RA No. 7581) of 27 May 1992

18. This is arguably the next most powerful statute in relation to anticompetitive conduct.

19. In considering the provisions within the Price Act it is vital to remember the purpose of this law – "An act providing protection to consumers by stabilizing the prices of basic necessities and Prime commodities and by prescribing measures against undue price increases during emergency situations and like occasions." So while some provisions have a wider application, the agency tasked with administration of the law is an agency with a major objective to deal with prices during emergency situations and focused on basic necessities and prime commodities as defined in the Act.

20. The Price Act includes the following key sections:

Section 5: Illegal acts of price manipulation

Section 15: Penalty for acts of illegal price manipulation

Section 17: Violation by juridical persons

Section 20: Criminal penalties without prejudice to administrative sanctions.

Section 3: Definition of terms – for the purposes of this Act, the terms:

“(1) ‘Basic necessities’ includes: rice; corn; bread; fresh, dried and canned fish and other marine products, fresh pork, beef and poultry meal; fresh eggs; fresh and processed milk; fresh vegetables; root crops; coffee; sugar; cooking oil; salt; laundry soap; detergents; firewood; charcoal; candles; and drugs classified as essential by the Department of Health.”

and at subsection (8):

“‘Prime commodities’ include fresh fruits; flour; dried processed and canned pork; beef and poultry meat; dairy products not falling under basic necessities; noodles; onions; garlic; vinegar; patis; soy sauce; toilet soap; fertilizer; pesticides; herbicides; poultry; swine and cattle feeds; veterinary products for poultry, swine and cattle; paper. School supplies; nipa shingles; sawali; cement; clinker; GI sheets; hollow blocks; plywood; plyboard; construction nails; batteries; electrical supplies; light bulbs; steel wire; and all drugs not classified as essential drugs by the Department of Health.”

Section 10: Powers and responsibilities of implementing agencies, subparagraph (9): Investigations may be conducted of any violation of this Act and, after due notice and hearing, administrative fines may be imposed in such amount as may be deemed reasonable and which shall in no case be less than 1,000 pesos nor more than 1 million pesos.

21. The Price Act offers a realistic option to address anticompetitive price collusion across a broad range of commodities. It is a long way from dealing with the total economy and does not address the provision of services.

22. The Price Act does not directly address the conduct of corporations; however, section 17 clearly establishes that liability will be with the responsible officials and employees.

The Downstream Oil Industry Deregulation Act (RA No. 8479) 1988

23. The two most relevant sections within this law relate to cartelization and predatory pricing in sections 11 (a) and (b).

24. Penalties for violation of section 11 include from three to seven years imprisonment, and fines ranging from 1 million pesos to 2 million pesos. As with other criminal sanctions, sanctions apply to natural persons.

The Revised Penal Code (RA 3185), article 185

“Machinations in public auctions.”

25. It is noteworthy that this is the first reference to an “attempt” at anticompetitive conduct being treated in the same way as actual conduct.

Philippines Corporation Code, Act No. 68. (1982)

26. Mergers and acquisitions are covered by sections 76 to 80 of the Corporation Code. Parties are required to file articles of the merger or consolidation with the Securities and

Exchange Commission. Approval by the Commission is required prior to issuing a certificate of merger or consolidation.

27. There is no competition assessment or competition law-based guidelines that would be used by the Securities and Exchange Commission when considering a merger prior to approval.

Summary of the current laws

28. The most comprehensive law dealing with anticompetitive conduct is within the Revised Penal Code – the statute provides no administrative penalty options and does not penalize corporations other than via the employees and officials of those companies (in the existing regime in the Philippines, criminal liability can only be found against individuals and not legal entities). The provision does offer a custodial penalty and a paltry fiscal penalty of 6,000 pesos. The conduct most easily recognized that can be dealt with in this statute is a combination in restraint of trade, which would include a cartel by the normal definition of the term.

29. The Price Act offers regulators an alternative to criminal sanctions when pursuing cartel conduct. Administrative penalties are available and may be levied without impact on the scope for pursuit of criminal sanctions. The reach of the Price Act is limited, however – only conduct concerning goods defined in section 3 as “basic essentials” or “prime commodities” is captured.

30. Merger control does not allow the prohibition of a merger on the basis of competition analysis.

31. There exists, therefore, what appears to be a robust law dealing with attempts to manipulate public auctions and also with attempts to manipulate price/participation.

32. With the exception of the Price Act, and in addition to treble damages under civil penalties, the laws are of a criminal nature, requiring proceedings to be launched and dealt with in compliance with Supreme Court rules. Offences need to be proven to a criminal standard, beyond doubt, before the prosecutor can succeed.

B. Association of Southeast Asian Nations guidelines

33. The Philippines, as a member State of the ASEAN Economic Community, has adopted a goal of introduction of nation-wide competition policy and law by 2015.

34. In summary form, the current laws of the Philippines, when assessed against the framework suggested by the ASEAN guidelines, are as follows:

<i>ASEAN regional guidelines</i>	<i>Philippines competition law</i>
Prohibition against anticompetitive mergers	No
Merger regime – with power to suspend	No
Prohibition against collusive agreements	Yes
Leniency policy	No
Prohibition applying to vertical conduct	No
Prohibition against unilateral conduct	No
Criminal sanctions	Yes for individuals, no for corporations
Private rights	Yes

C. Potential for new competition laws

35. Proposals for the enactment of a unified competition law started in the 1990s, but it was only during the fourteenth Congress³ that legislative efforts picked up, resulting in the drafting of the first consolidated bill.⁴ During the fifteenth Congress, consolidated bills in substitution of a number of existing bills have reached the third reading in the Senate and the House of Representatives. The Senate passed committee report No. 97 (annex A) recommending approval of the consolidated bill.

36. Similar bills, as well as new versions, were filed in the sixteenth (current) Congress. Committee hearings in both chambers are underway and, for its part, the OFC has submitted an updated version of the consolidated bill (annex B) after a series of consultations with private and government entities.

37. While it may be too early to predict, a consolidated version of these earlier bills will, optimistically, be filed and will progress into law during the life of the sixteenth Congress. A factor in this optimism is the ASEAN goal of a nationwide competition law and policy by 2015.

III. Institutional framework

38. The institutional framework within the Philippines changed dramatically on 9 June 2011 when the President issued executive order No. 45. Significantly, this order designated the DOJ as the Competition Authority, while at the same time creating the OFC under the Office of the Secretary of Justice to perform the following duties and responsibilities:

- “a. Investigate all cases involving violations of competition laws and prosecute violators to prevent, restrain and punish monopolization, cartels and combinations in restraint of trade;

³ The Congress of the Philippines is the national legislature of the country consisting of two chambers – the Senate and the House of Representatives. The Senate members (known as senators) are elected for six-year terms on a nationwide voting system. As a result of this system, 12 of the elected Senators fall due for replacement at each three-year election. Members of the House of Representatives (known as congressmen/congresswomen) are elected for three-year terms.

⁴ The OFC shepherded the preparation of the first consolidated bill when the DOJ Assistant Secretary was elected chair of the Senate Subcommittee on Antitrust during the fourteenth Congress.

- b. Enforce competition policies and laws to protect consumers from abusive, fraudulent, or harmful corrupt business practices;
- c. Supervise competition in markets by ensuring that prohibitions and requirement of competition laws are adhered to, and to this end, call on other government agencies and/or entities for submission of reports and provision for assistance;
- d. Monitor, implement measures to promote transparency and accountability in markets;
- e. Prepare, publish and disseminate studies and reports on competition to inform and guide industry and consumers; and
- f. Promote international cooperation and strengthen Philippine trade relations with other countries, economies, and institutions in trade agreements.”

39. The practical result of the executive order is that the Philippines now has an overarching government body established with the purpose of investigating and enforcing existing competition laws, monitoring and supervising markets to improve accountability and transparency and in general terms promoting information to enhance competition and protect consumers.

40. The creation of the OFC does not limit the role of the 63 sectoral regulators but does introduce expectation of a collegiate or concurrent approach.

A. The sector regulators

41. The Philippines has many sector regulatory bodies established by sector-specific laws. The most prominent include the Energy Regulatory Commission (ERC), the Department of Energy, the National Telecommunications Commission, the Philippines Port Authority and the Department of Trade and Industry. Each of these regulatory agencies is of unique institutional design, but none is truly independent of the executive power.

42. It should be noted that in the Philippines, many regulatory functions are under the purview of the executive or legislative power. For example, the National Telecommunications Commission and the ERC do not have the authority to issue “licences” as is the case in most countries. The operation of telecommunication services and electricity distribution requires a “national franchise” granted by the Congress. Port charges – such as wharfage and wet charges – that are of national application require approval from the Office of the President.⁵ When it comes to competition regulation, however, these authorities are given broad residual power.

43. In effect, the enforcement of competition rules in regulated sectors until today is very limited. No competition cases have yet been brought to court by any of these bodies despite the fact that a number of these regulated markets appear to be highly concentrated and hence susceptible to restrictive practices.

B. Relationship between the Office for Competition and sector regulators

44. The executive order 45 which created the OFC did not diminish the legal authority of the sector regulators.

⁵ PDP Australia Pty Ltd and Meyrick and Associates, 2005, Promoting effective and competitive intra-ASEAN shipping services: The Philippines country report. Available at <http://www.asean.org/archive/AADCP-REPSF-Project/Philippines.pdf> (accessed 28 April 2014).

45. It should be noted also that neither of the competition bills currently proposed by the Senate and the House of Representatives envisions the centralization of the Competition Authority. Pending bills stipulate that the power of the future Competition Authority shall be "cumulative" to that of the different government agencies over an industry or sector of an industry and shall not in any way derogate the power and authority of these agencies. At the same time, these bills do not exempt regulated sectors with their own regulatory body from the competition law. They prescribe that "all government agencies shall cooperate and coordinate with one another in the exercise of their powers and duties to prevent overlap, share information, or such other effective measures".

46. Although the pending bills advocate concurrent regulation, concrete details about the scope and method of cooperation and coordination are not prescribed. One House of Representatives bill, for instance, touches upon the specific issue. It stipulates that the competition regulatory body shall consult with the sectoral regulatory body when issuing guidelines of rules and regulations that are applicable to regulated industries.

47. However, the OFC version submitted to the sixteenth Congress proposes that jurisdiction in the enforcement and regulation of all competition-related issues should be vested in the Competition Authority.

C. Institutional aspects of the proposals in the House of Representatives and Senate Competition Bills

48. The consolidated Senate version in the fifteenth Congress proposes an office for competition in the DOJ, much like the current institutional structure of the OFC, but with legal power. The office would report to the congressional oversight on competition, to be composed of chairpersons of designated Senate and House of Representatives committees, two senators and two representatives nominated by the Senate President and the Speaker of the House Representatives. The office would be funded through an annual general appropriations act with 10 million pesos for the initial budget requirement.

49. The consolidated House of Representatives version, also of the fifteenth Congress, proposes an independent Competition Authority, the Philippines Fair Competition Commission. The Commission would be composed of a chairperson and four associate commissioners. The chairperson and two associate members would be members of the Philippines Bar, while the other two members would be of recognized competence in the field of economics, commerce, accounting or financial management. All members would be appointed by the President.

50. It is noteworthy that the OFC has taken the initiative to prepare the consolidated Senate version for the current Congress.

51. Section 4.3 of the *ASEAN Guidelines on Regional Competition Policy* entitled "Institutional structure of the Competition Regulatory Body" provides that:

- "(1) Member countries may choose the appropriate institutional design of their respective competition authority, be it a single independent authority, multiple sectoral authorities or a body within the government department or ministry;
- (2) Member countries may grant a competition regulatory body as much administrative independence as necessary and as possible, to avoid political influence;
- (3) Member countries may determine that the Competition Authority's budget should be free from political considerations - that is, that they separate the authority's budget from that of other governmental functions or make part of the budget dependent on income generated by the competition regulatory body;

(4) Member countries should also determine whether they would establish an administrative appeal body which is independent of the competition regulatory body and executive Government or leave appeals to the judicial authority.”

52. The institutional design of the Competition Authority proposed by both Senate and House of Representatives competition bills is that of an agency under a government organization, namely, the DOJ in the case of the Senate’s version and the Office of the President in case of the House of Representative’s version. Hence, the administrative and financial independence of the proposed competition agencies are potentially limited. However, the House’s version does allow the Competition Authority to keep all income generated from performing its duties, except financial penalties. Both versions provide for an appeal to the judicial authority.

53. The UNCTAD Model Law on Competition⁶ commentary makes it clear that it is not possible to lay down how the authority should be integrated into the administrative or judicial machinery of the given country. “The present Model Law has been formulated on the assumption that probably the most efficient type of administrative authority is one which is a quasi autonomous or independent body of the Government, with strong judicial and administrative powers for conducting investigations, applying sanctions, etc., while at the same time providing for the possibility of recourse to a higher judicial body.”

54. Of the two models proposed in the fifteenth Congress, the House of Representatives version is the “most independent” structurally, and arguably less prone to political interference. In practice however, the DOJ currently has key criminal investigation and prosecution teams within it (the National Bureau of Investigation (NBI) and the National Prosecution Service (NPS)) which appear to be respected as professional enforcement/prosecution agencies.

55. Ultimately, the decision on agency design is best left to the Philippines – the balance of costs, efficiency, effectiveness and speed of implementation all need to be part of the decision while respecting the ultimate effectiveness of a Competition Authority is heavily reliant on the perception of independence from political interference.

IV. The Office for Competition – key initiatives for the first 33 months

56. As previously reported, the establishment of the OFC by executive order 45 was a significant step toward the development of an economy-wide competition regime. Notwithstanding that the OFC was established by executive order in June 2011 without any new legislative tools, the significance of this Competition Authority cannot be ignored. For this reason it is useful to document the major activities and achievements of this relatively new organization.

57. A considerable effort was required to deliver an organization in a manner consistent with the executive order. By October 2011, the Secretary of the DOJ issued department order No. 844, formally organizing the OFC and designating an Assistant Secretary in charge. Thus, the first Competition Authority of the Philippines was created.

⁶ Paragraph 160, chapter IX, of the 2010 Model Law on Competition, published at the direction of the Intergovernmental Group of Experts on Competition Law and Policy, tenth session, 7–9 July 2009.

58. By January 2012, the OFC had adopted a dictum, vision, mission and set of principles or values.⁷

59. The immediate focus of the new Competition Authority on enunciating clear fundamental values is important. In the Philippines, given the levels of perceived corruption and inequalities, the OFC is to be commended for being very open and transparent about certain core values – concepts such as transparency, accountability, fairness and truth.

60. The OFC has been granted annual budgets as a separate regular item in the General Appropriations Act. From only two full-time staff in 2012, the OFC now has 15 full-time lawyers and economists complemented by a composite team of 20 lawyers from agencies attached to the DOJ. The creation of additional legal and economics divisions is expected within the year.

61. The OFC has recognized the need to work in a manner that is both complementary and cooperative with sector regulators. To respond to the functions defined in executive order 45, working groups have been established, each being co-chaired by a representative of the sector regulators.

62. In this initial phase of establishing a workable Competition Authority, this working party approach with high-level engagement by other key regulators is sensible and likely to assist the overall ideal of cross-sector cooperation.

63. The Secretary of the DOJ has issued draft guidelines designed to better explain how the OFC and sector regulators would work together as required to comply with executive order 45. The objective of the guidelines is to add helpful explanations concerning referral processes, complaint handling, and to clarify the relationship between technical regulation, economic regulation and competition enforcement. The scope of this challenge is highlighted by the number of regulators listed in the guidelines: a total of 63 sectoral agencies have been identified.

64. The OFC likewise issued its first policy paper, entitled “Cooperation for competition: The role and functions of a Competition Authority and sector regulatory agencies”, designed to develop a framework for the interface between the OFC and sector regulators.

V. Enforcement action

65. The OFC has issued enforcement guidelines, such as the executive order 45 implementing rules, legal representation guidelines, advisory opinions on legal and consumer protection matters, and updated complaint-handling procedures. Policy papers and case studies on competition issues were developed and sector studies in telecommunications, energy and transport are in preparation. The OFC has also established the Sector Regulators Council for the clustering of sectors and case investigation.

66. The first cartel case involving liquefied petroleum gas dealers was filed in 2012. The case is now under a motion for reconsideration.

67. The OFC has 21 cases in its files, seven of which have been resolved while the remaining 14 are in the process of assessment.

⁷ OFC, 2012, “Year 1 report and Strategic Plan of Action”, available at http://www.aseancompetition.org/resources/articles_publications/2012-07/ofc-year-1-report-and-strategic-plan-action (accessed 1 May 2014).

VI. Competition advocacy

68. Competition advocacy can be an extremely important function for a Competition Authority in developing economies where the promulgation of laws and regulations are not yet properly assessed for their impact on market competition. Many monopolies or oligopolies can be traced back to State policies or regulations that serve to restrict market entry or favour a dominant incumbent over smaller competitors or potential new entrants.

69. Executive order No. 45 does not spell out the OFC's advocacy role. It appears to focus on its adjudicative responsibilities of enforcing fragmented competition provisions under different laws and the monitoring of trade practices in the market. The competition bills of both the Senate and the House of Representatives put similar emphasis on adjudication although both prescribe that the Competition Authority "proposes legislation for the regulation of commerce, trade or industry".

70. The OFC and the Tariff Commission that acted as the focal office for previous competition work have done much advocacy work with the private sector. As an office under the DOJ, the OFC also has naturally strong ties with judges, public prosecutors and investigators.

71. The OFC prepared an advocacy plan which led to the issuance of presidential proclamation No. 384 declaring 5 December of every year as National Competition Day.

72. Moreover, as the key indicator of its work, the OFC published its Year 1 and Year 2 Annual Reports. It also launched the first ever introductory course on competition law and policy for law and business degree students at a premier university in the country.

73. Regular consultations with business organizations and industry associations were undertaken to promote voluntary compliance to competition laws.

74. However, consumers and civil society, the other major key stakeholders, are not yet fully aware of issues relating to competition law and policy. The OFC, as well as the regulatory authorities proposed in both the Senate and the House of Representatives bills, are also not mandated to advise the government on competition matters.

75. While the absence of a workable competition law may limit the capacity of the OFC to engage in meaningful advocacy and outreach, the OFC has identified an ongoing commitment to advocacy as a key priority within the current Strategic Plan of Action as follows: "Preparation of long-term advocacy plan including regular updating of OFC website, publication of IEC [information, education and communication] materials, and advocacy programmes for business (with a focus on SMEs [small and medium-sized enterprises]), consumer, media, academic and related groups/sectors".

VII. International cooperation and technical assistance

76. The OFC Year 1 Report states:

"Members of OFC have been to workshops and seminars in Japan, Viet Nam, Singapore, Korea [the Republic of Korea], Thailand, Laos [the Lao People's Democratic Republic], Indonesia, Brunei and Australia. OFC has established relationships with organizations including Japan International Cooperation Agency (JICA), European Union (EU), German Cooperation Agency (GIZ), American Bar Association – Rule of Law Initiative (ABA-ROLI), United States Agency for International Development (USAID) and World Bank–International Finance Corporation (WB–IFC)."

77. In addition to participation in the events mentioned, OFC has taken an active role in the ASEAN Experts Group on Competition and has been elected as chair for the period 2013–2014. Its key initiatives include the development of:

- (a) A memorandum of understanding on regional cooperation;
- (b) Sector studies at the regional and/or national levels;
- (c) A mechanism for categorizing ASEAN Experts Group on Competition documents;
- (d) A system for measuring the effectiveness of ASEAN member States individually and collectively as part of ASEAN through major indicators.

78. The OFC is now recognized within ASEAN and across the international community as the central agency implementing competition law and policy within the Philippines. It became a member of the International Competition Network in 2012.

79. The OFC entered into a memorandum of understanding with the Japan Fair Trade Commission for cooperation in enforcement and technical assistance. It hosted the 2013 ninth East Asia Top Level Officials' Meeting on Competition Policy and the eighth East Asia Conference on Competition Law and Policy, and will be this year's host of the fourth ASEAN Competition Conference.

80. Perhaps the greatest challenge facing the OFC is to devise methodologies to ensure learnings from international visitation and/or training workshops are institutionalized. In the early days of any organization there is a real risk that internal systems are not mature enough to adequately capture the arrival of new information and translate it into systems and procedures for the benefit of the organization. Thus, the OFC focus has been to develop a basic system that ensures that all national and international events attended and/or organized are properly documented and disseminated.

81. Overall, it can be said that the country has made meaningful strides in the implementation of competition law and policy through the OFC. These gains have translated into an improving performance in global rankings for the Corruptions Perception Index (from 129th in 2011 to 94th in 2013) and the Global Competitiveness Index (from 75th in 2011–2012 to 59th in 2013–2014).

VIII. Recommendations

82. It is impossible to progress to detailed observations about competition law without firstly acknowledging the ongoing challenge of removing corruption and perceptions of inequality from the community. Slogans such as "No corruption, no poverty" and "Corruption steals from the poor" appear as part of the push to crack down on corruption. The extent to which corruption impacts on the consideration of laws cannot be underestimated. All laws need to be administered in a manner that is understood by the wider community to be transparent and just. While this may not be easy to deliver, it is clear the OFC has started life with this in mind. In fact, the OFC has prepared a second policy paper entitled "Governance in the enforcement of competition policy and law" that discusses the best mechanism for effective enforcement of competition law and policy.

83. It is reported that the President of the Philippines has used his power of veto on as many as 200 laws during the fifteenth Congress – many of these being local laws. Discussion on this previously very rarely used authority suggests that the veto has been applied where the President sees practical challenges in applying the law as framed, and the potential for unintended consequences. While the legislative process provides for the houses to jointly deal with such situations there is no record that any bill vetoed by the

President has subsequently been enacted by vote of the two houses. This trend would suggest the President is using his power to significantly contribute to the reform process to ensure that new laws do not bring any further inequalities/unfairness to the community even where it is unintended.

The law – current and potential new laws

84. The existing laws in the Philippines do not deliver a comprehensive competition framework. The need for a new set of laws is well documented with the recent bills before the fifteenth Congress being a practical demonstration that a comprehensive competition law is close. Exactly how close is impossible to measure.

Recommendation: A comprehensive competition law applying to all parts of the economy should be drafted and passed into law through the parliamentary process at the earliest opportunity.

85. Two issues that are worthy of mention as a new law is being contemplated is the question of exemptions, and the level of independence of the regulator.

Recommendation: Any new law should be designed as an “economy wide” law with very limited scope for exemptions unless a public benefit test is written into the law.

86. The discussion of competition bills before the fifteenth Congress has in part been side tracked to a discussion about the merits of an independent regulator versus an “in-house” regulator.

87. Far more important than the question of so-called independence is the question of adequate and ongoing funding.

Recommendation: Any new regulatory model should be adequately funded to deliver traditional enforcement together with education, advocacy and business support. The concept of the agency being self-funded by retaining monies levied as penalties or fines should be avoided due to the perverse incentives it creates.

Recommendation: Any new regulatory model should be established in a manner that has considered the call for independence from political interference within the UNCTAD Model Law on Competition, and is likely to be perceived by the wider community as effectively independent of the political system.

The criminal standard of proof

88. The existing laws in the Philippines offer criminal penalties when an offence can be proven before the court. As with all criminal offences in the Philippines, the burden of proof for such offences is the very high criminal burden – beyond reasonable doubt.

89. The proposals for new laws before the fifteenth Congress also include criminal offences.

90. Is it realistic to frame competition law in this criminal environment?

91. The pursuit of competition law offenders as criminals is not unique to the Philippines. The real issue is the extent to which a lesser offence with a lesser burden of proof may be desirable.

92. The competition regulator, whether “independent” or “internal”, armed with a comprehensive new law that meets all of the criteria recommended by ASEAN guidelines will still face the major challenge of how to implement the law in a manner that encourages the commercial sector to quickly become compliant. Perhaps not surprisingly, the toolbox

of the regulator will need to include criminal, civil and administrative sanctions along with educational/advocacy efforts.

Recommendation: The effective use of the full range of enforcement options must be recognized by both the legislature and the officials of any future competition regime. The challenge of the criminal burden of proof for cases involving anticompetitive agreements and the lengthy time frame for such cases to progress drive a need to consider all options to quickly drive compliance.

Administrative penalties

93. The bills before the fifteenth Congress provide for administrative penalties within the range 10 million pesos to 50 million pesos for a natural person. Penalties for a firm range from 250 million pesos to 750 million pesos. These are very significant penalties and will need to be administered in a manner that is consistent and transparent. While there is no competition law, it is not possible to test the administration of penalties under that law, but it is possible to review the processes used in the Department of Trade and Industry to get a feel for the likely process.

94. The administrative penalty as provided for in the Price Act and the proposed competition laws is a penalty without reference to an independent judicial body. It is understandable that some parties may argue that the Competition regulator must be independent if it has the power to impose penalties of up to 750 million pesos. In a community where there is a long standing suspicion about the fairness and equity of some government agency decisions, it seems inevitable there will be suspicion surrounding decisions to impose or not to impose penalties and the size of those penalties.

Recommendation: Clear guidelines should be produced explaining decision-making, evidence-taking, hearings and appeal rights for the administration of any penalty regime included in any new competition laws.

Concept of joint and several liability

95. A feature of both bills before the fifteenth Congress is a provision dealing with the joint and several liability of company officers.

96. This is an extremely important feature of a competition enforcement regime – the capacity to hold a number of natural persons liable and prevent the corporate shield from removing any incentive to comply is vital.

Recommendation: Any competition law should contain a provision to ensure, where the offender is a corporation, partnership, association, firm or other entity, that the financial liabilities are joint and several directed against directors, executive officers, general partners, and the like.

Dealing with leniency policy, whistle-blowers and “attempted unlawful conduct”

97. Competition law needs to be framed to provide a basis to deal with both actual and attempted anticompetitive conduct.

98. It is important that the attempt to contravene the law is dealt with as harshly as the actual conduct.

99. While discussing this topic it is worth considering the protections offered to potential witnesses be they whistle-blowers, leniency applicants or simply citizens who have somehow become witnesses of some relevant fact.

100. The foregoing concern may be addressed by the Witness Protection Programme under the DOJ, a mechanism that encourages witnesses to testify by protecting them against reprisals and economic dislocation

Recommendation: Any new regime must include a leniency regime, whistle-blower protection and an offence for attempted anticompetitive conduct to be truly effective. Consideration should be given to the concept of leniency, not just immunity.

The capacity of the Department of Justice prosecution regime

101. A number of agencies have a role in the pursuit of criminal offences as envisaged by the draft laws. To quickly recapitulate, the regime will have OFC staff investigating and collecting evidence, NBI staff assisting and also collecting evidence, NPS staff conducting the preliminary investigation and if a decision is taken to proceed to court, prosecuting the case before the Regional Trial Court.

102. The OFC is to be commended for already having NBI staff seconded to work within the ranks of the OFC. It is clear that the OFC leadership understands there is a capacity-building challenge ahead. Notwithstanding this awareness, there remains cause for concern that a failure to properly appreciate the resource demands from within the NBI will impact negatively on the implementation of any new competition law regime.

Recommendation: Any budget proposal to fund a Competition Agency must at the same time consider the funding implications for the National Bureau of Investigation and the National Prosecution Service.

The judiciary – capacity

103. The OFC has already engaged in some advocacy and capacity-building work, including some early work in the education of legal professionals with an information/education event held with a number of judges early in 2013. As with much of the early education/advocacy work that has been undertaken, the OFC is to be commended for recognizing the judiciary as a target audience.

Recommendation: The Office for Competition should maintain a relationship with the judiciary to ensure the court is well versed in any new law, and equally in the demands that will be placed on the court when cases are presented for adjudication. This relationship must respect the independence of the court officers, but can be managed in a manner that is beneficial to both the regulator and the judiciary.

The enforcement task

104. The challenge of managing the gathering of evidence and the prosecution tasks associated with enforcing competition law has already been touched on. It is equally important to consider the range of skills needed to deliver the full range of an enforcement regime.

105. The structure and staffing of the regulatory body need to reflect the complexity of the task – especially in the early days of a new law. There will be pressure to prosecute cases before the court as this is the only way to develop the law – jurisprudence helps interpret the law and only results from contests before the court. The reality for a competition regulator is that this will take time – many years. The range of enforcement tools cannot all be put on hold waiting for the courts to interpret and develop the law. The administration (whether within the DOJ or independent) will need to develop an enforcement policy to help the broader commercial sector understand what this regulator is about.

106. Linked to the enforcement task but not part of that task is the need to have capacity to undertake market analyses – clearly there is a need to understand various markets and the potential for anticompetitive conduct to be influencing the consumer experience in a negative way. The skills to perform this work are not necessarily based on the same skills needed for those officers at the sharp end of evidence gathering and prosecution activity.

107. After a series of trainings on sector studies and market analysis, the OFC is now preparing studies and inquiries in the transport, energy and telecommunications sectors.

Recommendation: The OFC should continue the work it has already commenced to ensure that capacity is built in all facets of the administration of an effective competition law. Consideration should be given to ongoing engagement within the ASEAN community and the wider international community to assist in the development of skills and policies in this critical area. Early consideration should be given to approaches that take advantage of social media and the latest technology.

Public awareness – a complaint-handling regime

108. The OFC has recognized in its Strategic Plan of Action the need for a complaints-handling process. This is far more important than just having a robust internal process so that matters are managed and not lost. This internal process needs to be a key pillar on which public confidence is built.

Recommendation: The OFC should proceed with the development of a complaint-handling regime and a reporting regime that will contribute towards the building of public confidence.

Summary of recommendations

109. The recommendations are best considered when grouped into those directed toward legislators, the Government and/or agency officials.

Directed to legislators

A comprehensive competition law applying to all parts of the economy should be drafted and passed into law through the parliamentary process at the earliest opportunity.

Any new law should be designed as an “economy wide” law with very limited scope for exemptions unless a public benefit test is written into the law.

Any new regulatory model should be established in a manner that has considered the call for independence from political interference within the UNCTAD Model Law on Competition, and is likely to be perceived by the wider community as effectively independent of the political system.

The effective use of the full range of enforcement options must be recognized by both the legislature and the officials of any future competition regime. The challenge of the criminal burden of proof for cases involving anticompetitive agreements, together with the lengthy time frame for such cases to be processed require that all options are considered to quickly drive compliance.

Any competition law should contain a provision to ensure that, where the offender is a corporation, partnership, association, firm or other entity, the financial liabilities are joint and several directed against directors, executive officers, general partners, and the like.

Any new regime must include a leniency regime, whistle-blower protection and an offence for attempted anticompetitive conduct to be truly effective. Consideration should be given to the concept of leniency and not just immunity.

Directed to Government

Any new regulatory model should be adequately funded to deliver traditional enforcement together with education, advocacy and business support. The concept of the agency being self-funded by retaining monies levied as penalties or fines should be avoided due to the perverse incentives this creates.

Any budget proposal to fund a Competition Agency must at the same time consider the funding implications for the NBI and NPS.

Directed to agency officials

The effective use of the full range of enforcement options must be recognized by both the legislature and the officials of any future competition regime. The challenge of the criminal burden of proof for cases involving anticompetitive agreements, together with the lengthy time frame for such cases to be processed require that all options are considered to quickly drive compliance. (Duplicated in legislator section.)

Clear guidelines need to be produced explaining decision-making, evidence-taking, hearings and appeal rights for the administration of any penalty regime included in any new competition laws.

The OFC should maintain a relationship with the judiciary to ensure the court is well versed in any new law, and equally in the demands that will be placed on the court when cases are presented for adjudication. This relationship must, of course, respect the independence of the court officers, but can be managed in a manner that is beneficial to both the regulator and the judiciary.

The OFC should continue the work it has already commenced to ensure capacity is built in all facets of the administration of an effective competition law. Consideration should be given to ongoing engagement within the ASEAN community and the wider international community to assist in the development of skills and policies in this critical area. Early consideration should be given to approaches that take advantage of social media and the latest technology.

The OFC should proceed with the development of a complaint-handling regime and a reporting regime that will contribute towards the building of public confidence.





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Item 3 (a) of the provisional agenda
Consultations and discussions regarding peer reviews
on competition law and policy, review of the Model Law
on Competition and studies related to the provisions
of the Set of Principles and Rules**

**Voluntary Peer Review of Competition Law and Policy:
Philippines**

Overview

Corrigendum

The corner notation on document TD/B/C.I/CLP/31 should read as above

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**Voluntary Peer Review of Competition
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Seychelles

Overview

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Note

Voluntary peer reviews of competition law and policy carried out by UNCTAD fall within the framework of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, adopted by the General Assembly in 1980. The Set seeks, among other things, to assist developing countries in adopting and enforcing effective competition law and policy, suited to their development needs and economic situation.

This Voluntary Peer Review of Competition Law and Policy has been prepared in response to the request of the Intergovernmental Group of Experts as stated in the Report of the Intergovernmental Group of Experts on Competition Law and Policy on its thirteenth session (TD/B/C.I/CLP/25). The opinions expressed in this Voluntary Peer Review are those of the peer reviewers and do not necessarily reflect the views of the United Nations Secretariat.

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This review was prepared for UNCTAD by Alex Kububa and Carl Buik. The substantive backstopping and review of the document was the responsibility of Hassan Qaqaya. UNCTAD would like to acknowledge the valuable assistance provided by George Tirant, Chief Executive Officer of the Fair Trading Commission of Seychelles. UNCTAD would also like to acknowledge the commissioners and staff of the Commission who contributed during the preparation of this report.

Preface¹

1. This Voluntary Peer Review of Competition Law and Policy is an independent review of the competition and consumer protection legislation of Seychelles, based on extensive research and a fact-finding and stakeholder-consultation visit to the State. Research included the review of competition and consumer protection legislation and related policy documents. During the fact-finding visit, which took place from 8–12 October 2012, a total of 50 individuals from 17 organizations were interviewed.²

I. Socioeconomic background

2. Seychelles, which gained independence from the United Kingdom of Great Britain and Northern Ireland in 1976, consists of an archipelago of about 115 islands in the Indian Ocean northeast of the island of Madagascar off the coast of the African continent.

3. Historically, the economy of Seychelles was based on plantations, with cinnamon, vanilla and copra as the chief exports. Following the opening of the international airport on the island of Mahé in 1971, tourism became the dominant industry. The Government of Seychelles has recently moved to reduce the dependence on tourism by promoting the development of farming, fishing and small-scale manufacturing. Despite attempts to improve its agricultural base and emphasize locally manufactured products and indigenous materials, Seychelles continues to import 90 per cent of what it consumes.³ In an attempt to reduce this vulnerability, in the mid-1980s approximately 30 parastatal companies were created, covering all sectors of the economy. State-owned and parastatal enterprises have come to account for more than half of the State's gross domestic product and two thirds of formal employment.⁴

4. The dissolution of the Seychelles Marketing Board, a government parastatal that used to operate all the major supermarkets and was the distributor and licensor of most other imports,⁵ was initiated in 2006 as a result of the liberalization of domestic trade under the International Monetary Fund enhanced structural adjustment facility. As noted by the Director General of the Trade Division of the Ministry of Finance, Trade and Investment during the visit to Seychelles, this dissolution was one of the triggers for the establishment of a competition authority to regulate competition among privatized companies.

5. The executive summary of the Seychelles Government Strategy 2017 document states that to achieve the doubling of the country's gross domestic product by the year

¹ All findings detailed in this Voluntary Peer Review were current at the time of the fact-finding visit to Seychelles.

² The organizations consulted were the Vice-President's Office, Finance and Public Accounts Committee of the National Assembly, Ministry of Finance, Trade and Investment, Attorney General's Chambers, Supreme Court, Seychelles Chamber of Commerce and Industry, Fair Trading Commission, Seychelles Media Commission, Customs Division of the Seychelles Revenue Commission, Central Bank of Seychelles, Seychelles Investment Board, National Consumers Forum, National Bureau of Statistics, Seychelles Public Transport Corporation, Public Utilities Corporation, Seychelles Licensing Authority and the Small Enterprise Promotion Agency.

³ Wikipedia, 2014, available at http://en.wikipedia.org/wiki/Economy_of_Seychelles (accessed 25 April 2014).

⁴ United Nations Framework Convention on Climate Change, 2004, available at <http://unfccc.int/resource/ccsites/seychell/backgrnd/index.htm> (accessed 25 April 2014).

⁵ Wikipedia, 2014, available at http://en.wikipedia.org/wiki/Economy_of_Seychelles (accessed 25 April 2014).

2017, "it is the Government's policy to create economic conditions conducive to increased wealth generation by private businesses and individuals. The Government proposes to accomplish this by curtailing its role as an economic actor and to focus instead on operating as an economic facilitator, allowing Seychellois and international business to benefit from an increasingly business-friendly economic environment, streamlined regulatory structure and capable human resource base".⁶ In 2012, Seychelles prepared a new Seychelles Sustainable Development Strategy 2010–2020, and preparation of a new national development plan is ongoing.⁷

II. Current legislation on competition and consumer protection

6. The Fair Trading Commission was established under the Fair Trading Commission Act 2009 and primarily administers the Fair Competition Act 2009 and Consumer Protection Act 2010. The Commission may also enforce any written laws relating to consumer protection and fair competition, as well as other written laws that it has the jurisdiction to administer.

A. Fair Trading Commission Act

7. The preamble to the Fair Trading Commission Act states: "An Act to provide for the establishment of a Fair Trading Commission, to safeguard the interests of consumers, to monitor and investigate the conduct of business enterprises, to promote and maintain effective competition in the economy, and to provide for matters connected therewith."⁸ The establishment of the Fair Trading Commission under the Act is therefore related not only to the enforcement of the State's competition law but also to consumer protection law.

B. Fair Competition Act

8. The Fair Competition Act came into operation on 5 April 2010. Similar to most other competition legislation worldwide, the Fair Competition Act covers the three major competition concerns of anti-competitive agreements of both a horizontal and vertical nature, abuse of dominance or monopolization and anti-competitive mergers.

1. Part I: Preliminary provisions

9. The preliminary provisions of the Act include the short title of the Act and its commencement date, interpretation and application. Application of the Act to commercial activities of the State only refers to markets that are open to participation by other enterprises, effectively excluding markets dominated by statutory monopolies. Seychelles still has a number of State-owned enterprises, some in monopoly positions, and this exclusion therefore exempts a large number of enterprises from application of the competition law.

⁶ Seychelles, *Strategy 2017* (2007), available at <http://www.egov.sc/documents/strategy2017.pdf> (accessed 25 April 2014).

⁷ African Economic Outlook, 2013, available at <http://www.africaneconomicoutlook.org/en/countries/east-africa/seychelles/> (accessed 25 April 2014).

⁸ Seychelles, President and National Assembly, *Fair Trading Commission Act*, 2009.

2. Part II: Fair Trading Commission

10. The functions of the Commission are wide ranging and are all directed at promoting competition in the economy of the State, including investigating anti-competitive practices and preventing such practices, as well as educating consumers on their competition rights and obligations.

11. Section 4 of the Fair Competition Act assigns responsibility for administering the Act to the Commission. Section 5(1) of the Act states that the Commission shall:

- (a) Be responsible for the promotion and maintenance of fair competition;
- (b) Carry out on its own initiative or at the request of any person or enterprise that has an interest in a matter, such investigations in relation to the conduct of trade:
 - (i) As will enable it to prevent the use of business practices in contravention of this Act; or
 - (ii) As it may consider necessary or desirable in connection with any matters falling within the provisions of this Act;
- (c) Keep under review commercial activities to ensure that practices that may adversely or unfairly affect the interests of consumers and businesses are prevented or terminated;
- (d) Take such action as it considers necessary:
 - (i) To prevent the abuse of a dominant position by an enterprise;
 - (ii) To eliminate anti-competitive practices; and
 - (iii) To prevent or control anti-competitive mergers;
- (e) Make available to consumers general information with respect to their rights and obligations under this Act; and
- (f) Perform such other functions to give effect to this Act.⁹

3. Part III: Restrictive business practices

(a) Prohibition of abuse of a dominant position

12. Section 7(1) of the Act prohibits abuse of a dominant position, "if it may adversely or unfairly affect trade within Seychelles".¹⁰ The term trade is defined in section 2 as "any trade, business, industry, profession or occupation relating to the supply or acquisition of goods or services".¹¹

13. Section 7(2) of the Act states: "For the purposes of this Act, an enterprise or enterprises together hold a dominant position or a joint dominance in a market if that enterprise or enterprises together occupy such a position of economic strength as will enable them to operate in the market independently without effective competition from their clients, competitors or potential competitors."¹²

⁹ Seychelles, President and National Assembly, *Fair Competition Act*, 2009.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

14. Section 7(3) of the Act states:

Conduct may, in particular, constitute such an abuse if it consists in:

- (a) Restricting the entry of any enterprise into that or any other market that supplies or is likely to supply a substitute for the goods or services supplied in that market;
- (b) Preventing or deterring any enterprise from engaging in competitive conduct in that or any other market;
- (c) Eliminating or removing any enterprise from that or any other market;
- (d) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions that are excessive, unreasonable, discriminatory or predatory;
- (e) Limiting production, markets or technical development to the prejudice of consumers;
- (f) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (g) Making the conclusion of agreements subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements;
- (h) Exclusive dealing, market restriction or tied selling.¹³

(b) *Prohibition of agreements preventing, restricting or distorting competition*

15. Section 11(1) of the Act provides that "agreements between enterprises, trade practices or decisions of enterprises, or undertakings or concerted practices of enterprises that have or are likely to have as their object or effect the prevention, restriction or distortion of competition within Seychelles, are prohibited unless they are excluded in accordance with the provisions of this subpart".¹⁴

16. Section 11(2) of the Act clarifies that the prohibition under section 11(1) applies to agreements, practices, undertakings or decisions that:

- (a) Directly or indirectly fix purchase or selling prices, or determine any other trading conditions;
- (b) Limit or control production, markets, technical development or investment;
- (c) Provide for the artificial dividing up of markets or sources of supply;
- (d) Affect tenders to be submitted in response to a request for bids, including:
 - (i) Not to submit a bid in response to a call or request for bids or tenders; or
 - (ii) As bidders they submit, in response to a call or request, bids or tenders that are arrived at by agreement between or among themselves, unless enterprises are not able to submit their bids individually;
- (e) Apply dissimilar conditions to equivalent transactions with other parties engaged in the same trade, thereby placing those other parties at a competitive disadvantage; or
- (f) Make the conclusion of agreements subject to acceptance by parties other than the offeror of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements.¹⁵

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

17. The above provisions do not distinguish between horizontal and vertical agreements.

(c) *Prohibition of resale price maintenance*

18. Resale price maintenance is a form of vertical price fixing, and is per se prohibited in many countries.¹⁶ The provisions on resale price maintenance in subpart III of the Act are comprehensive and address the necessary features and treatment of this anti-competitive practice.

(d) *Mergers*

19. Section 21 of the Act prohibits mergers not permitted by the Commission, and states:

All mergers involving an enterprise that:

- (a) By itself controls; or
- (b) Together with any other enterprise with which it intends to effect the merger is likely to control,

40 per cent of a market or such other amounts as the Minister may prescribe are prohibited unless permitted by the Commission in accordance with this subpart.¹⁷

20. There is a convergence of views among competition analysts on the basic elements or issues that should be incorporated or addressed in any system of merger control. In this regard, the merger control provisions in subpart IV of the Act are not comprehensive, and cover only basic issues such as merger applications and notifications and guidelines for permissions for mergers.

(e) *Proscribed anti-competitive business conduct*

21. Proscribed anti-competitive business conduct, addressed in subpart V of the Act, includes the practices of price fixing, production limiting and bid rigging. Section 25(1) of the Act describes the following acts of price fixing:

- (a) By agreement or promise, intimidation or threat or any like means, attempt to influence an increase, the maintenance or a reduction of the price at which any other enterprise supplies or offers to supply, or advertises for goods or services; or
- (b) Refusal to supply goods or services to, or otherwise discriminate against any other enterprise engaged in business because of the low pricing policy of that enterprise or for any other reason.¹⁸

22. The above provisions are significant in that they clearly describe acts of price fixing, including boycotts by cartel members against deviating enterprises.

(f) *Authorizations*

23. Subpart VI of the Act provides for authorizations of anti-competitive practices. In this regard, section 28(1) and section 28(2) of the Act state:

¹⁶ Organization for Economic Cooperation and Development, 1993, *Glossary of Industrial Organization Economics and Competition Law*, Paris.

¹⁷ Seychelles, President and National Assembly, *Fair Competition Act*, 2009.

¹⁸ Ibid.

(1) Notwithstanding this Act, an enterprise that proposes to enter into or carry out an agreement or to engage in a business practice which, in its opinion, is an agreement or practice affected or prohibited by this Act, may apply to the Commission in the prescribed form for an authorization to do so.

(2) The Commission upon receipt of an application under subsection (1) may grant an authorization, where it is satisfied that the agreement or practice, as the case may be, is likely to promote the public benefit and is reasonable in the circumstances.¹⁹

4. Part IV: Investigations by and hearings before the Commission

24. Section 32 of the Act states that the Commission may initiate a complaint against an alleged restrictive business practice and section 33(1) provides that any person may submit to the Commission a complaint against, or information concerning, an alleged restrictive business practice. The Commission is obliged, under section 34, to investigate complaints against or allegations of restrictive business practices, as well as proposed mergers.

25. The Commission's investigative powers under section 34(2) of the Act facilitate the undertaking of dawn raids and include entering and searching premises and inspecting and removing for copying any documents.

26. Section 35(1) of the Act provides for the discontinuation of the Commission's investigations if the Commission is of the opinion that the matter being investigated does not justify further investigation. Section 35(2) states:

Where the Commission discontinues an investigation under subsection (1), it shall:

(a) Within 14 days of the discontinuation notify the parties concerned in the investigation of the discontinuation; and

(b) Submit a report of the discontinuation to the Minister within three months of such discontinuation.²⁰

5. Part V: Assessments of restrictive business practices

27. Section 40(1) of the Act provides that the Commission, before deciding on any remedial action to be taken regarding the adverse or unfair effects on competition of a restrictive business practice or merger, should consider any offsetting public benefits of the practice or merger. Section 40(2) states:

A benefit shall be considered for the purposes of subsection (1) if it is shown that the effects of any absence, prevention, restriction or distortion of competition are outweighed by specific gains of:

(a) The safety of goods and services;

(b) The efficiency with which goods are produced, supplied or distributed or services are supplied or made available;

(c) The development and use of new and improved goods and services and in means of production and distribution; or

(d) The promotion of technological and economic progress, and the benefits have been or are likely to be shared by consumers and businesses in general.²¹

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

6. Part VI: Determinations of cases by the Commission and penalties and remedies

28. The determinations and remedies of the Commission on restrictive business practices and mergers provided for under part VI of the Act are standard, universal and of both a structural and behavioural nature.

C. Consumer Protection Act

29. The Consumer Protection Act, the national consumer protection legislation of Seychelles, was approved on 25 November 2010. The Act supersedes the 1997 Consumer Protection Act and includes all of the elements usually encompassed by national consumer protection laws.

1. Part I: Preliminary

30. Part I specifies the short title of the Act and matters related to interpretation, including definitions of key terms. Potentially problematic inconsistencies and omissions may be noted in the definitions provided in the Consumer Protection Act versus those in the Fair Competition Act.

2. Part II: Fair Trading Commission

31. As noted in paragraph 6 of this report, the Commission is responsible for administering the Fair Competition Act and its competition provisions and the Consumer Protection Act. Part II of the Consumer Protection Act delineates the consumer protection objectives of the Commission and its functions, including receiving complaints, investigating suspected contraventions, reporting and making determinations.

3. Part III: Unfair contract terms

32. Part III prohibits unfair contract terms and the provisions therein reflect the fact that in many situations, consumers' apparent choices in the market are non-existent, as they are not permitted to negotiate the terms of their contracts. While a significant proportion of unfair contracts are likely to be found in mass markets where standard form contracts are the norm, they may also be encountered wherever there is a significant power imbalance between traders and consumers, for example where there is a monopoly or oligopoly, demand is inelastic or consumers are impoverished or less well educated.

4. Part IV: Unfair trade practices

33. Sections 19–26 on disclosure and information provide that consumers should be given certain essential information about the goods and services on offer, including the price, full cost and any trade descriptions prescribed by the minister responsible for trade, so that they may make more informed purchasing decisions.

34. Sections 27–29 on fair and responsible marketing prohibit the quasi-fraudulent conducts of bait advertising and referral selling. Section 28 provides for the minister to make regulations in respect of distance selling. A review of summaries of complaints received by the Fair Trading Commission reveals that the three conducts specified have not been the subject of a single complaint.

35. The provisions on fair and honest dealing take two different approaches, but correspond to the universal core prohibitions of almost all consumer protection laws. Sections 30–32 address misleading or deceptive conduct and false representations and sections 35–37 cover the offering of gifts and prizes with the intention of not delivering, dishonest acceptance of payment and pyramid selling.

36. Section 38 on the right to choose is a detailed description of consumers' rights in the event of receipt of unsolicited goods, and includes the related processes to ensure that consumers are not obliged to pay because they have received unsolicited goods, while also providing for the basic protection of traders' legitimate rights.

5. Part V: Fair value, good quality and safety

37. Section 40 sets out mandatory standards for the performance of services. The list of requirements is adequate and uncontroversial. The remedies are limited but functional and in most cases sufficient for remedy of any defect or provision of a proportional refund. The stand-alone use of the word portion in section 40(2)(b) raises the question as to whether the Commission could advise, or the Board of Commissioners could order, a full refund in appropriate cases, for example where no service or only an inconsequential element of a contracted service is provided.

6. Part VI: Consumer safety

38. Sections 49–59 provide a comprehensive regime for establishing a general safety requirement and the means of determining the requirements in particular cases, investigating potential contraventions and resolving contraventions. While the general layout of the regime is logical, the detail in individual sections is complex, making awareness training for businesses more difficult than it might be in comparison to other parts of the Act.

7. Part VII: Industry codes

39. Section 61 institutes the basic prohibition that a participant in an industry shall not contravene an applicable industry code. Section 62 empowers the minister to prescribe and declare an industry code and make such provision as the Commission recommends fit for the registering of persons bound or otherwise affected by an industry code.

8. Part VIII: Penalties and remedies

40. Commonly accepted objectives of sanctions provided by consumer protection laws and imposed by authorities include ceasing the contravening conduct, undoing the harm as far as possible, refunding ill-gotten gains, encouraging future compliance by the contravener, encouraging market-wide compliance and punishing the contravener. Penalties, usually in the form of a fine, are the most commonly provided and imposed sanction. Section 67 sets out factors that should be considered when determining the appropriate penalty. This list is appropriate and comprehensive of relevant factors.

III. Institutional framework

A. Institutions

41. There are two main institutions provided for under the competition and consumer protection legislation of Seychelles, the Fair Trading Commission and the Appeal Tribunal.

1. Fair Trading Commission

42. The Fair Trading Commission is an autonomous statutory body established by the Fair Trading Commission Act to administer and enforce the Fair Competition Act and the Consumer Protection Act. The Commission is a quasi-judicial body, with both investigative and adjudicative functions. In practice, but not specifically provided for by either the Fair

Competition Act or the Consumer Protection Act, the Fair Trading Commission has two operating branches. The Board of Commissioners is the adjudicative branch and governing body and the Commission acts as the investigative and administrative branch.

(a) *Board of Commissioners*

43. The Board of Commissioners is appointed according to the terms in section 5(1) of the Fair Trading Commission Act for a three-year term of office. The statutory composition of the Board is five members and, in addition, the Chief Executive Officer of the Commission, who is an ex officio member. Section 5(2) of the Act states that appointed members of the Board should be "persons from the public and private sector appointed by virtue of their qualifications and experience in law, economics, accountancy or commerce".²²

44. The Board acts as the strategic decision-making body for the Fair Trading Commission, making decisions on all investigations of restrictive practices under the Fair Competition Act and Consumer Protection Act, conducting hearings with the parties concerned and imposing directions or agreeing to undertakings where necessary.²³

(b) *Fair Trading Commission staff*

45. The Commission is headed by the Chief Executive Officer, and consists of the following five departments:

(a) Communication and Corporate Services. The major areas of responsibility of this department are awareness of and sensitization on competition and consumer protection laws. The department also undertakes normal administrative work, such as financial and human resources management. The Consumer Affairs and Competition Departments have also been given advocacy and awareness functions.

(b) Consumer Affairs. This department enforces the Consumer Protection Act.

(c) Competition. This department enforces the Fair Competition Act and undertakes investigations based on complaints of restrictive business practices.

(d) Research and Policy. This department undertakes market studies and assists in economic analyses of competition cases. The department has designed a database on both competition and consumer cases, and is working on a comprehensive competition policy.

(e) Legal Affairs. This department is mainly a vetting department and is thereby linked to the other departments of the Commission, vetting all cases investigated by the Consumer Affairs and Competition Departments. The Legal Affairs Department also undertakes legal drafting work and is involved in drafting memorandums of understanding with other organizations.

46. The Commission is understaffed in certain areas. At the time of the fact-finding visit to Seychelles, the staff complement was only 17 members.

2. **Appeal Tribunal**

47. The Appeal Tribunal, established by the Fair Trading Commission Act, is a necessary institution in the enforcement of competition and consumer protection laws in

²² Seychelles, President and National Assembly, *Fair Trading Commission Act*, 2009.

²³ Seychelles, Fair Trading Commission, 2014, see <http://www.ftc.sc/index.php> (accessed 25 April 2014).

Seychelles. However, at the time of the fact-finding visit, the Tribunal had still not been established. The Chief Executive Officer of the Fair Trading Commission advised that the chairperson of the Tribunal must be a senior-level lawyer and that a suitable candidate had not yet been found.

B. Budget and financial resources

48. Section 27(1) and Section 27(2) of the Fair Trading Commission Act state:

- (1) The funds of the Commission consist of:
 - (a) Moneys appropriated by the Appropriation Act and paid to the Commission; and
 - (b) Moneys lawfully charged by the Commission.
- (2) The funds of the Commission may be applied by the Commission:
 - (a) In payment of:
 - (i) Expenses incurred by the Commission in the performance of its functions; and
 - (ii) Such remuneration and allowances due to the Commissioners, the staff of the Commission and any experts retained by the Commission; and
 - (b) To create any reserves determined by the Commission.²⁴

49. Section 57 of the Act also empowers the minister responsible for trade to make regulations for, inter alia, fees or charges "in connection with services given under this Act".²⁵ The annual budget of the Commission is less than US\$1 million. The Chief Executive Officer of the Fair Trading Commission advised during the fact-finding visit that in 2012 the Commission was appropriated a sum of SR 8.05 million by the Government for its operations, and that for the 2013 financial year it had submitted a bid for SR 10 million.

C. Case handling

50. As noted during the fact-finding mission, between the commencement of operations in 2010 and October 2012, the Fair Trading Commission handled 290 cases, of which 274 were related to consumer protection and 16 to competition.

51. Competition cases handled by the Commission are divided into five categories, as shown in table 1.

²⁴ Seychelles, President and National Assembly, *Fair Trading Commission Act*, 2009.

²⁵ Ibid.

Table 1
Categories of competition cases

Category	2012			Total
	2010	2011	(to October)	
Abuse of a dominant position	2	0	4	6
Anti-competitive agreement	0	3	1	4
Resale price maintenance	1	0	2	3
Merger	1	0	0	1
Anti-competitive business conduct	0	0	2	2
Total	4	3	9	16

52. In 2011, the last full year, 264 consumer complaints were received. Of these 17 (6 per cent) were found not likely to involve contraventions of the Consumer Protection Act, 155 (59 per cent) were resolved to the satisfaction of the complainant, 14 (5 per cent) progressed to substantive investigations that were determined by the Board and 78 (30 per cent) were still being investigated at the end of the reporting year.

D. Relations with sector regulators

53. Seychelles has a number of sector regulators. Most were established before the Fair Trading Commission and therefore have a number of competition functions. Regulation is in such sectors as financial services (the Central Bank of Seychelles and Seychelles Investment Board), communications (Communication Division of the Department of Information Communications Technology), energy (Seychelles Energy Commission), media services (Seychelles Media Commission) and fishing (Seychelles Fishing Authority).

54. All sector regulators consulted during the fact-finding visit indicated that they have, or should have, good working relationships with the Fair Trading Commission.

55. In its September 2012 research note on the best operational framework between the Fair Trading Commission and sector regulators, the Commission observed that "the establishment of the Fair Trading Commission mandated to enforce the Competition and Consumer Protection Acts, which cover all sectors of the economy, has created some level of confusion and conflict with regard to certain sector regulators' role and mandate vis-à-vis competition and consumer related issues".²⁶

56. The Consumer Protection Act has specific provisions on relationships with regulatory and other authorities, particularly in section 78(1)(b), which states that the Commission may "negotiate and enter into agreements with any regulatory authority which exercises jurisdiction over consumer matters within a particular industry or sector, so as to coordinate and harmonize the exercise of jurisdiction over such matters within that industry or sector; and to ensure the consistent application of this Act".²⁷

57. The Fair Competition Act, however, does not include provisions on relations with sector regulators with competition functions. Section 6(1)(a) of the Fair Competition Act gives the Commission powers to "enter into such contracts as may be necessary or expedient for the purpose of performing its functions under this Act".²⁸ These provisions do

²⁶ Seychelles, Fair Trading Commission, *Research note: Best operational framework between the Fair Trading Commission and sector regulators* (Victoria, 2012).

²⁷ Seychelles, President and National Assembly, *Consumer Protection Act*, 2010.

²⁸ Seychelles, President and National Assembly, *Fair Competition Act*, 2009.

not, however, specifically refer to concurrent jurisdiction agreements with other sector regulators with competition functions, and also do not oblige other sector regulators to conclude such agreements with the Fair Trading Commission.

E. Strategic plan

58. The Fair Trading Commission has a three-year strategic plan to guide and lead its operations. The mission statement, vision and core values of the Commission under this plan are as follows:

(a) Mission statement. Advocate in favour of sound competition and consumer protection policies to safeguard the interests of consumers and the competition process and implement these policies through advocacy, market studies and enforcement, in partnership with all stakeholders.

(b) Vision. Championing market efficiency for consumers' socioeconomic welfare.

(c) Core values. Integrity: behaving in an ethical, legal and transparent manner; high performance and excellence: investing in continuous professional development of staff; quality service: offering people-friendly services; consumer rights advocacy: empowering consumers to exercise their rights; teamwork: working collaboratively within the Fair Trading Commission and maintaining good relations with stakeholders; and dynamism and innovativeness: responding to new challenges with creative solutions.²⁹

IV. Other relevant issues

A. Human resources

59. The implementation of competition policy and law is relatively new in Seychelles, having effectively commenced only in 2009. Competition policy and law is not taught at the University of Seychelles and recruitment options for the Fair Trading Commission are therefore limited. The current staff members are adequately qualified, with certifications in relevant fields such as economics, law, management and accounting. The Fair Trading Commission also has an effective staff development programme in place.

60. With regard to consumer protection, the National Consumers Forum has been operational for over 18 years.

B. Advocacy, education and awareness

61. Advocacy and education have challenges common to both competition and consumer protection. However, there are some significant differences, which influence the strategies of the Fair Trading Commission and the content of its activities. Generally, the goals and even the elements of consumer protection law are widely accepted by stakeholders and debate is more often on case-specific details. The goals and elements of competition, however, are difficult for some stakeholders to understand, and acceptance that the competition process will have an economy-wide effect on consumer interests is not widespread. In part this is because of the political and economic history of Seychelles, but

²⁹ Seychelles, Fair Trading Commission. *Strategic plan: 2011–2014* (2011).

also because of the common view among stakeholders, as noted during the fact-finding visit, that Seychelles is "too small". In Seychelles, an exception to this relates to warranties.

62. The three-year strategic plan prioritizes advocacy and awareness and describes a number of related goals to be met, including:

- (a) Holding fortnightly sessions with consumer groups on rights and responsibilities;
- (b) Creating an action plan for sensitizing Government;
- (c) Launching quarterly disseminations of information and educating citizens via mass media;
- (d) Conducting workshops and seminars targeting government agencies;
- (e) Holding regular meetings with sector regulators to address issues of public interest;
- (f) Launching monthly tailored sessions with various business groups;
- (g) Developing advocacy programmes for highly concentrated sectors;
- (h) Conducting quarterly awareness sessions with government bodies, private bodies, consumers and other relevant stakeholders;
- (i) Launching bi-annual alerts on policy matters for government agencies; and
- (j) Launching an annual newsletter on the challenges and achievements of the Fair Trading Commission.

C. International cooperation

63. The Commission has only been operational for a few years, yet it is actively cooperating with various other competition authorities and organizations in the region and internationally, including with other national competition authorities under the Common Market for Eastern and Southern Africa, particularly through its representation on the current Board of Commissioners of the competition commission of the Common Market. The Commission also cooperates with other competition authorities under the Southern African Development Community through its participation in the Competition and Consumer Policy and Law Committee. In addition, the Commission is a member of the Southern and East African competition authority and the recently formed African Competition Forum.

V. Findings and recommendations

64. The Fair Trading Commission Act is a well drafted piece of legislation and, after review of the Act and the findings of the visit to Seychelles, relatively few proposed revisions to the Act were identified. The Fair Competition Act is comprehensive and contains all the basic elements of competition law. However, the arrangement of its various provisions on restrictive business practices is not well coordinated.

65. The Consumer Protection Act is a comprehensive consumer protection law that includes provisions in respect of each of the major areas expected of modern consumer law. The most significant deficiency identified is the lack of clarity in the term commission. Given the distinct functions and activities of the two branches of the Fair Trading Commission, the use of the generic term commission does not adequately distinguish

between the determinative body referred to in the Act as the Board of Commissioners and the administrative and investigative body of the Commission.

66. Another significant observation is that there is no articulated consumer protection policy. The absence of a policy has not prevented the Fair Trading Commission and a number of other regulators from actively undertaking their consumer protection functions. However, in the absence of a policy, it is more likely that the various stakeholders will pursue their own agendas without regard to the functions and activities of fellow regulators.

67. In the absence of a policy, it is also more likely that consumer protection will be seen as simply the resolving of individual consumer problems, rather than as a significant building block of national development in the way that competition law has been recognized. While some informal liaison between a number of regulators does occur, as noted during the fact-finding visit, these efforts need to be expanded. This is particularly important in a small economy where there must be less tolerance for duplication of effort or inefficient enforcement.

68. The Fair Trading Commission is a new agency with modest resources. On the basis of interviews with stakeholders, commissioners, the Chief Executive Officer and staff members, it is apparent that the Fair Trading Commission is a well led regulatory agency that is functioning satisfactorily. With one exception, no concerns were identified in the institutional arrangements, processes and procedures.

69. The major institutional failing identified is the non-existence of the Appeal Tribunal. The immediate effect of the Appeal Tribunal not having been established is that if a party is dissatisfied with a determination of the Board, it may lodge an appeal, but that appeal cannot be heard. A party that wishes to nullify the Board's determination on a matter may do so therefore simply by lodging an appeal, knowing that it cannot be heard. This potential tends to bring the entire process into disrepute and may contribute to the view that the Fair Trading Commission and Consumer Protection Act have no substantive authority. In the long term, lack of a Tribunal denies testing of the Board's determinations and the establishment of precedent.

70. Tables 2-5 detail specific recommendations on competition, consumer protection, the Fair Trading Commission and other relevant matters.

Table 2

Recommendations on competition matters

<i>Topic</i>	<i>Recommendation</i>	<i>Directed to</i>
Revision of Fair Competition Act	The term merger in the Fair Competition Act should be expanded to include all the three types of mergers, horizontal, vertical and conglomerate, and other business combinations.	Legislature
	Common competition terms such as assets, confidential information, dominant position, essential facility, excessive price, horizontal agreement, negative clearance, regulator, undertaking and vertical agreement should be defined in the Fair Competition Act.	
	The definition of the term goods in the Fair Competition Act should be aligned with that in the Consumer Protection Act.	
	The definition of the term service in the Fair Competition Act should be aligned with that in the Consumer Protection Act, but with the inclusion of the word financial.	

<i>Topic</i>	<i>Recommendation</i>	<i>Directed to</i>
	In order not to exempt a large number of enterprises in monopoly positions from application of the competition law, section 3(2) of the Fair Competition Act should be amended by removing the phrase "which is open to participation by other enterprises" from the end of the section.	
	In order not to rule out Fair Trading Commission investigations based on anonymous complaints or from informers, section 5(1) of the Fair Competition Act should be amended by removing the phrase "that has an interest in a matter" from section (1)(b).	
	The Fair Competition Act should provide under section 7(2) a dominance threshold based on market shares, and the utility of the 40 per cent market share threshold currently used by the Commission as an administrative guideline should be assessed with a view to formalizing it in the Act.	Legislature, on technical advice of the Fair Trading Commission
	Certain abuses that are widespread in Seychelles, such as denial of access to essential facilities, should be added to the list of conduct that constitutes abuse by firms in dominant positions, in section 7(3) of the Fair Competition Act.	
	The provisions in section 11 of the Fair Competition Act on anti-competitive agreements should deal separately with horizontal and vertical agreements. Under horizontal agreements, there should be a clear distinction between hard-core cartels, which should be per se prohibited, and other agreements, for which there should be an indication that they will be considered using the rule of reason approach.	
	The merger control provisions in the Fair Competition Act should cover all basic elements or issues of merger control. In particular, provision should be made for size-of-the-transaction merger notification thresholds, i.e. based on merging parties' annual sales or turnover, total assets or both and the charging of merger notification fees.	
	Per se prohibited anti-competitive agreements and practices should not be subject to authorization under the Fair Competition Act, and the term "public benefit" referred to in section 28(2) should be clearly defined.	
	The provision in section 35(2)(b) of the Fair Competition Act stating that if the Commission discontinues an investigation it should submit a report to the minister responsible for trade should be removed, as it limits the Commission's independence and reduces its decision-making autonomy.	Ministry of Finance, Trade and Investment

<i>Topic</i>	<i>Recommendation</i>	<i>Directed to</i>
Increasing Fair Trading Commission staff capacity	The Competition Department of the Fair Trading Commission should have a mixture of economists and lawyers as case officers, and the immediate recruitment of an economist and a lawyer should be considered.	Fair Trading Commission
Comprehensive competition policy	The Commission requires local, regional and international technical assistance in drafting a comprehensive competition policy, as the process requires extensive research on current national, regional and international economic and legal environments.	UNCTAD

Table 3

Recommendations on consumer protection matters

<i>Topic</i>	<i>Recommendation</i>	<i>Directed to</i>
Consumer protection policy	A comprehensive consumer protection policy should be developed in consultation with stakeholders and published.	Government
Aiding and abetting contraventions	Aiding or abetting a contravention of the Consumer Protection Act and the Fair Competition Act should be added as a new offence.	
Product safety	The Consumer Protection Act should be amended to include a reference to consumer safety in the objectives listed in section 3.	
Refunds for contravention of Part V provisions	Section 40(2)(b) of the Consumer Protection Act should be amended to read: "Refund to the consumer a reasonable portion or the whole of the price paid for the service performed and goods supplied, having regard to the extent of the failure".	
Product safety	Section 50(4)(a) and section 50(5)(b) of the Consumer Protection Act should be repealed to simplify the section and increase product safety. Section 50(4)(a) of the Consumer Protection Act should be amended to replace the words "that the person reasonably believed that the goods would not be used or consumed in Seychelles" with wording along the following lines: "if the person could not have known nor found out through reasonable enquiry that the goods failed to comply with the general safety requirement".	
Efficient and effective compliance	The Fair Trading Commission should explicitly adopt the concept of the pyramid of enforcement responses and continue its current practice of attempting to resolve most complaints through negotiations and warnings. In addition, the Commission should use more serious contraventions or contraventions by repeat offenders, to test the limits of the law with a view to increasing the likelihood that more low-level contraventions will be resolved quickly and at low cost.	Fair Trading Commission

<i>Topic</i>	<i>Recommendation</i>	<i>Directed to</i>
Unfair contract terms	The Commission should publish a guideline explaining the provisions on unfair contract terms.	
Business access to information	The Commission website should include a page either listing any applicable trade descriptions prescribed by the minister responsible for trade and the relevant expiry dates or providing links to other government websites where such information may be obtained.	
More effective monitoring by and involvement of National Consumers Forum	The Commission should consider potentially enlisting the cooperation of the National Consumers Forum in an ongoing monitoring programme focused on the display of expiry dates and failure to label in an appropriate language or provide receipts, with a view to contributing to enforcement actions of the Commission.	
Respective roles of Fair Trading Commission and Board	Discontinuance reporting should be one of the issues considered when clarifying the respective roles of the Commission and Board of Commissioners.	Government and Fair Trading Commission
Penalties and their application	Maximum fines should be increased to a level at which they provide the Board with penalty options that will act as a significant deterrent to the worst contraventions and reflect the quite significant financial incentives sometimes linked to unlawful conduct in a commercial environment. Section 67 of the Consumer Protection Act should be amended to read: "67(1) Where the Commission determines after a formal hearing that a person has contravened any requirement or prohibition contained in sections the Commission may order the person: (a) In the case of an individual, to pay a penalty of a sum not exceeding SR 1 million; or (b) In the case of a person other than an individual, to pay a penalty of a sum not exceeding SR 4 million. (2) Where a body corporate is found to be in breach of this Act, any director or officer of the body corporate who knowingly authorized, permitted or acquiesced in the act or omission that constituted the breach shall also be liable to a penalty of a sum not exceeding SR 1 million." The Commission should routinely consider each of the factors in section 67 and any other factors it considers relevant when imposing sanctions, and its reasoning should be referred to in its written determinations.	
Sanctions and remedies	Consideration should be given to amending the Consumer Protection Act to provide a wider range of sanctions and remedies and the Board should consider the expanded use of section 68(b) where appropriate.	

<i>Topic</i>	<i>Recommendation</i>	<i>Directed to</i>
Potential new and temporary role for Fair Trading Commission	Consideration should be given to amending the Consumer Protection Act to grant the Fair Trading Commission specific powers in relation to business pricing conduct during the phase-in period of the new tax regime, together with appropriate funding.	
National Consumers Forum	The concept of providing for a designated super complainant and the practicality of designating the National Consumers Forum as a super complainant should be explored.	

Table 4
Recommendations on Fair Trading Commission matters

<i>Topic</i>	<i>Recommendation</i>	<i>Directed to</i>
Revision of Fair Trading Commission Act	Section 32(2) of the Fair Trading Commission Act, which states that the Fair Trading Commission may decide not to investigate a competition complaint against an enterprise where the complainant subsequently obtains reasonable redress, should be removed.	Legislature
	Section 39(2) of the Fair Trading Commission Act should be amended to entitle respondents and other interested parties in a competition or consumer protection case to be heard at Commission hearings along with the complainant. Fines provided for under the Fair Trading Commission Act for breaches of the Act should be raised to a more deterrent level.	
	The Fair Trading Commission Act should clearly separate, with well-defined responsibilities and spheres of operation, the investigative and adjudicative functions of the Commission, with the Commission formally responsible for statutory investigative functions and the Board of Commissioners for adjudicative functions.	
	In order to ease quorum problems on the Board, membership should be increased from five to eight members, and members should be drawn from diverse economic backgrounds in order to avoid one sector dominating membership. The terms of office should also be increased to five years, to enable the members to fully contribute to the operations of the Commission, with sufficiently accumulated experience as competition and consumer protection adjudicators. The terms of the members should be staggered, in order to avoid a sudden and complete departure of experience and knowledge.	Ministry of Finance, Trade and Investment
	Section 5(1) of the Fair Trading Commission Act providing for ex officio membership of the Chief Executive Officer of the Commission on the Board should be removed, in order to avoid conflicts of interest in the	Ministry of Finance, Trade and Investment

<i>Topic</i>	<i>Recommendation</i>	<i>Directed to</i>
	Board's determination of competition and consumer protection cases. Alternatively, a separate Board may be established, without the Chief Executive Officer As a member, to only consider and adjudicate on competition and consumer protection cases.	and Legislature
	The Commission should be given statutory supremacy over competition matters in Seychelles. Sector regulators with competition functions should be obliged by statute to negotiate and conclude concurrent jurisdiction agreements with the Commission on the promotion of competition in their respective sectors.	
Remuneration of Commissioners	In addition to a fixed monthly fee, members of the Board should also be paid sitting fees for attending and participating at Commission meetings, including hearings.	Ministry of Finance, Trade and Investment
Building and increasing capacity of Fair Trading Commission officials	Vacant posts in the Commission, particularly that of Director of the Legal Affairs Department, should be filled as a matter of urgency. The Board should be given capacity-building and technical assistance in the highly specialized area of competition and consumer protection adjudication, including the provision of an expert consultant for a period of three to six months to assist in the training of Board members and implementation of the required changes in the Board's procedures.	Fair Trading Commission UNCTAD

Table 5
Recommendations on other relevant matters

<i>Topic</i>	<i>Recommendation</i>	<i>Directed to</i>
Appeal Tribunal	The Appeal Tribunal provided for in the Fair Trading Commission Act, Fair Competition Act and Consumer Protection Act should be established without further delay.	Ministry of Finance, Trade and Investment
Advocacy and awareness	In order to increase its visibility, the Fair Trading Commission should undertake more advocacy and awareness activities, aimed at ministries, the legislature and the judiciary, as well as business and consumer associations.	Fair Trading Commission
Increasing capacity of Fair Trading Commission officials	The Commission should continue to cooperate with other competition and consumer protection authorities in the regions of the Common Market for Eastern and Southern Africa and Southern African Development Community, particularly with regard to the use of and contribution to the Southern African Development Community online resource database on competition and consumer protection cases.	

<i>Topic</i>	<i>Recommendation</i>	<i>Directed to</i>
	The Commission should increase its level of participation in the programmes of relevant international organizations, such as the International Competition Network, International Consumer Protection and Enforcement Network, Organization for Economic Cooperation and Development and UNCTAD. The Commission will not only benefit from international best practices but will receive direct notification of the organizations' programmes, including conferences and workshops.	



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Consultations and discussions regarding peer reviews on competition law and policy, review of the Model Law on Competition and studies related to the provisions of the Set of Principles and Rules

Voluntary Peer Review of Competition Law and Policy: Namibia Overview

GE.14-50533



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Note

Voluntary peer reviews of competition law and policy carried out by UNCTAD fall within the framework of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices, adopted by the General Assembly in 1980. The Set seeks, among other things, to assist developing countries in adopting and enforcing effective competition law and policy suited to their development needs and economic situation.

This Voluntary Peer Review of Competition Law and Policy has been prepared in response to the request of the Intergovernmental Group of Experts as stated in the Report of the Intergovernmental Group of Experts on Competition Law and Policy on its thirteenth session (TD/B/C.I/CLP/25). The opinions expressed in this Voluntary Peer Review are those of the peer reviewers and do not necessarily reflect the views of the United Nations Secretariat.

The designations employed and the presentation of the material do not imply the expression of any opinion on the part of the United Nations Secretariat concerning the legal status of any country, territory, city or area, or of its authorities or concerning the delimitation of its frontiers or boundaries, or regarding its economic systems or degree of development.

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I. Historical, political and economic context

1. Namibia is a vast, sparsely populated country situated along the south Atlantic coast of Africa. It shares land borders with Angola and Zambia to the north, Botswana to the east, and South Africa to the south. With a total area of 825,418 km², Namibia is the world's thirty-fourth largest country.

2. Namibia, which officially became independent from South Africa on 21 March 1990, is a member of various regional and international groupings. Among these, notably, are the United Nations, African Union, Commonwealth of Nations, Southern African Development Community, Southern African Customs Union, Common Monetary Area, World Trade Organization, World Intellectual Property Organization (WIPO) and the African Regional Intellectual Property Organization (ARIPO).

3. Since independence, the Government of Namibia has pursued free-market economic principles to promote commercial development and job creation to bring disadvantaged Namibians into the economic mainstream. To facilitate this goal, the Government has actively courted foreign investment. The liberal Foreign Investment Act of 1990 provides guarantees against nationalization, freedom to remit capital and profits, currency convertibility and a process for settling disputes equitably. Namibia is classified as an upper middle-income country by the World Bank and ranks eighty-seventh in terms of ease of doing business.

4. The largest economic sectors of Namibia are mining, agriculture, manufacturing and tourism. Mining is the most important contributor to the economy, providing about 25 per cent of the country's revenue. Namibia is the fourth largest African exporter of non-fuel minerals and the world's fourth largest uranium producer. Rich alluvial diamond deposits make Namibia a primary source of gem-quality diamonds. Other minerals extracted industrially include lead, tungsten, gold, tin, fluorspar, manganese, marble, copper and zinc.

5. The economy of Namibia is closely tied to that of South Africa due to their shared history. Nearly 70 per cent of the imports of Namibia originate in South Africa, and approximately one third of Namibian exports go to the South African market. Namibia is seeking to diversify its trading relationship away from its dependence on South Africa. Accordingly, Europe has become a leading market for Namibian fish and meat, while Namibian mining concerns have purchased heavy equipment and machinery from Canada, Germany, the United Kingdom of Great Britain and Northern Ireland and the United States of America. The Government of Namibia is making efforts to take advantage of the United States African Growth and Opportunity Act, which provides preferential access to American markets for many products.

6. The currency of Namibia is the Namibia dollar (N\$), which was introduced in September 1993, and is fixed at parity with the South African rand (R) under the Common Monetary Area.

7. Competition law was enacted in Namibia under the Competition Act of 2003. The enactment of the law preceded the formulation and adoption of a comprehensive national competition policy for the country, a process that was ongoing by the time of the fact-finding visit to Namibia in November 2013.

8. Adoption of competition law by Namibia became imperative because of the country's closeness with South Africa, whose companies have many subsidiaries in Namibia and are engaged in various anti-competitive practices. Competition issues in Namibia had been regulated by the Regulation of Monopolistic Conditions Amendment Act

(1958) of South Africa, which was however not applied in Namibia after independence. Over time, the Government of independent Namibia recognized the urgent necessity for a competition law and commissioned a study, with the assistance of the European Union, which drafted a competition bill in 1996.

9. The Competition Act, 2003, of Namibia was signed into law by the President on 3 April 2003. The enforcement agency, the Namibian Competition Commission (NaCC), only came into operation in December 2008 with the appointment, by the Minister of Trade and Industry, of its first Board of Commissioners. The Secretary to the Commission was appointed by the Board of Commissioners as Chief Executive Officer of the Commission under the terms of section 13(1) of the Act on 1 September 2009.

II. Substantive content of Namibia's competition law

10. The Competition Act, 2003, is a general law of general application in line with international best practice. The preamble to the Act states its primary objectives as being "to safeguard and promote competition in the Namibian market; to establish the Namibian Competition Commission and make provision for its powers, duties and functions; and to provide for incidental matters".

11. The Act is arranged in 9 chapters dealing with: (a) preliminary provisions (chapter 1); (b) the NaCC (chapter 2); (c) restrictive business practices (chapter 3); (d) mergers (chapter 4); (e) jurisdiction of court (chapter 5); (f) general provisions (chapter 6); (g) offences and penalties (chapter 7); (h) application of the Act and other legislation relating to competition (chapter 8); and (i) transitional provisions (chapter 9).

A. Preliminary provisions

12. The Act's preliminary provisions cover the main definitions used, the purpose of the Act, and the application of the Act. The main definitional section 1 of the Act contains 21 definitions, a number of which concern common competition terms, such as "agreement" and "concerted practice". Other terms that are relevant to competition law enforcement in Namibia, such as "confidential information" and "historically disadvantaged persons", are also defined. The term "undertaking" is defined in the Act in line with definitions in other competition legislations in the Southern African Development Community region. The definition however seems to be causing enforcement problems for the Namibian competition authority in that it excludes some market players who can affect competition in the relevant markets, as does the definition of the term "goods", which seems to exclude commercial trading in certain agricultural goods from the application of the Act.

13. Some other common competition terms that have relevance to the enforcement of competition law in Namibia are however not defined in the Act. These include terms such as "relevant market", "dominant position", "negative clearance", "essential facility" and "statutory monopoly".

14. The purpose of the Act, outlined under its section 2, is to enhance the promotion and safeguarding of competition in Namibia. While some stated objectives of that purpose are efficiency and competition related, others relate to the achievement of different socioeconomic benefits of public interest.

15. Section 3 provides that the Act generally applies to all economic activity within Namibia or having an effect in Namibia, and also that the Act binds the State in so far as it engages in commercial activities. It is further provided that the Act applies to the activities

of statutory bodies, with the exception of those activities that are specifically authorized by law.

B. Namibian Competition Commission

16. The establishment of the NaCC as an independent juristic person, that is subject only to the Constitution of Namibia and the law, is provided for by section 4 of the Act. The Commission has jurisdiction throughout Namibia and is required to be impartial and to perform its functions without fear, favour or prejudice.

17. The NaCC has the responsibility of administering and enforcing the Act, and the statutory functions of investigating and remedying anti-competitive practices, inclusive of restrictive business practices and anti-competitive mergers, and of opening up markets. It also has the functions of advocacy, education and awareness, as well as of cooperating, and exchanging information with other competition authorities, and of advising the Government on matters of public interest and sector regulation concerning competition matters.

18. The NaCC also has statutory powers, under section 22 of the Act, of making rules related to its administration, organization and operations, including prescribing forms of applications, notices, certificates and other documents required for the purposes of the Act, as well as fees to be paid for the purposes of the Act. These powers must be exercised with ministerial approval.

C. Restrictive business practices

19. Chapter 3 of the Act, on restrictive business practices, is divided as follows: (a) part I, on restrictive agreements, practices and decisions; (b) part II, on abuse of a dominant position; (c) part III, on the exemption of certain restrictive practices; and (d) part IV, on investigation into prohibited practices.

20. Agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia, or a part thereof, are prohibited under the terms of section 23(1).

21. The stated objects or effects of prohibited agreements include those related to the hard-core cartel activities of price-fixing, market-sharing and bid-rigging, as well as production limitation. They also include relatively softer vertical restraint practices and conduct, such as discriminatory trading, conditional and tied selling, and resale price maintenance.

22. There is no clear distinction, under section 23, between the treatment of horizontal and vertical agreements, whose harmful effects to competition are not equal, and between those horizontal agreements that constitute hard-core cartel conduct, which should be *per se* prohibited, and those having some efficiency and/or pro-competitive elements, which should be considered using a "rule of reason" approach. This can present serious enforcement problems for the NaCC.

23. Abuse of a dominant position in a market is prohibited under section 26. Practices that constitute abuse of a dominant position in terms of the Act are of both an exploitative and exclusionary nature, including excessive pricing, discriminatory treatment, predatory pricing, and tied and conditional trading.

24. The Act also provides for the determination, by the Minister of Trade and Industry, of dominance thresholds in relation to undertakings. In this regard, the rules made under the

Competition Act, 2003, that were gazetted in March 2008 prescribed specific criteria for determining dominant positions in markets. Under these criteria, an undertaking has a dominant position if it has (a) at least 45 per cent of that market; (b) at least 35 per cent, but less than 45 per cent, of that market, unless it can show that it does not have market power; or (c) less than 35 per cent of that market, but has market power.

25. In terms of section 27, any undertaking or association of undertakings may apply to the NaCC to be exempted from the provisions of part I (restrictive agreements, practices and decisions) and part II (abuse of a dominant position) of chapter 3 of the Act in respect of any agreement or category of agreements, any decision or category of decisions and any concerted practice or category of concerted practices.

26. Exemption from the provisions of part I of chapter 3 can be applied for with regard to all anti-competitive agreements falling under section 23 of the Act, which does not distinguish between horizontal agreements, most of which should be per se prohibited, and vertical agreements, most of which should be considered using a rule of reason approach. This implies that even those horizontal agreements that should be per se prohibited, including hard-core cartel arrangements, can be considered for exemption. International best practice is that per se prohibited restrictive business practices should not be eligible for exemption from the application of competition rules.

27. Exemption from the provisions of part II of chapter 3 can also be applied for in relation to all forms of monopolization under section 24 of the Act, which constitute serious and highly anti-competitive restrictive business practices.

28. The NaCC has powers under section 33 of the Act to investigate restrictive business practices either on its own or upon receipt of a complaint. Any person can submit a competition complaint to the Commission.

29. Section 33(3) provides that if the NaCC decides to conduct an investigation into a restrictive business practice, it must give written notice of the proposed investigation to every undertaking to be investigated, indicating the investigation's subject matter and purpose, and inviting the undertakings concerned to submit any representations they may wish to make to the Commission in connection with any matter to be investigated. The concern is that in cartel investigations, warning the undertakings of investigations may result in the destruction of evidence.

30. The remedial actions under the Act against restrictive business practices are numerous and include cease and desist orders, possible restitution and damages, and imposition of fines. It is however noted that all the remedies are of a behavioural nature, and structural remedies for restrictive business practices are not specifically provided for in the Act.

31. The NaCC may also, under section 39 of the Act, apply to the High Court for an interim order, restraining undertakings from engaging in restrictive business practices pending the conclusion of investigations, if the NaCC believes it necessary for it to act as a matter of urgency for the purpose of preventing serious, irreparable damage to any person or category of persons, or protecting public interest.

32. Furthermore, under section 40, the NaCC may enter into settlement agreements with the concerned undertakings, during or after an investigation into an alleged restrictive business practice, by means of application to the High Court for confirmation as an order of the Court. The settlement agreement between the Commission and the concerned undertaking, which should be with the consent of the complainant, may include an award of damages to the complainant and any amount proposed to be imposed as a pecuniary penalty.

D. Mergers

33. The merger control provisions in chapter 4 the Act are extensive and cover pertinent issues such as change of control, pre-merger notification and merger notification thresholds.

34. The definition of the term "merger" under section 42 of the Act shows the change of control that must occur in the transaction and covers the three common types of mergers, as well as joint ventures. It also covers the acquisition of controlling interests in both shares and assets of other undertakings. From stakeholder consultations held, the need for greater clarity in the definition to avoid misinterpretation and misrepresentations was nevertheless recognized.

35. Section 43(3) prohibits any person from implementing a proposed merger, unless it has been approved by the NaCC, and is implemented in accordance with any conditions attached to the approval. This requires pre-merger notification, which is in line with international best practice.

36. Section 43(2) provides for the determination of merger notification thresholds by the Minister of Trade and Industry. The Minister, as per Government Notice No. 307 (determination of class mergers to be excluded from chapter 4 of Competition Act, 2003), accordingly determined the merger notification thresholds, which set a value equal to or below (a) N\$20 million of the combined assets, or annual turnover, in Namibia of the merging parties; (b) N\$20 million of the annual turnover in Namibia of the acquiring undertaking plus the assets in Namibia of the target undertaking; (c) N\$10 million of the annual turnover, or assets, in Namibia of the target undertaking.

37. In line with international best practice, the determined merger notification thresholds are based on "size-of-the-transaction" factors of assets and/or annual turnovers and also provide an appropriate local nexus of jurisdiction as recommended by both the Organization for Economic Cooperation and Development and the International Competition Network. Stakeholders consulted, including the NaCC, were however of the opinion that the gazetted merger notification thresholds are low and do not serve their intended purpose of screening out small mergers with few competition concerns from intensive merger examination.

38. The period for making determinations in relation to proposed mergers is provided for under section 45 of the Act. In this regard, the NaCC must consider and make a determination in relation to a proposed merger of which it has received notification within 30 days after notification or, if the Commission requests further information, within 30 days after the date of receipt of the information. If NaCC decides to convene a conference on the proposed merger, the determination must be made within 30 days after the date of conclusion of the conference. The NaCC may also extend the above merger examination periods due to the complexity of the issues involved, but the extension should be by notice in writing to the merging parties and should not exceed 60 days.

39. In making a determination in relation to a proposed merger, the NaCC may give approval for the implementation of the merger, with or without conditions, or may decline to give approval for the implementation of the merger. The NaCC may base its determination of a proposed merger on any criteria which it considers relevant to the circumstances, including public interest issues.

40. Section 49 provides for the review, by the Minister of Trade and Industry, of NaCC merger decisions. In this regard, a party to a merger may make an application to the Minister to review the Commission's decision on the merger no later than 30 days after notice is given by the NaCC of its determination. The Minister may overturn the decision of the Commission, amend the decision by ordering restrictions or including conditions, or confirm the decision.

41. Stakeholder concerns were expressed that the Act does not specify criteria that can be used by the Minister in reviewing NaCC decisions on mergers, as it does in the determination of mergers by the Commission.

E. Jurisdiction of court

42. Under section 52, the High Court of Namibia has jurisdiction to hear and determine any matter arising from proceedings instituted under the Act. The High Court is empowered to impose pecuniary penalties for contravention of the provisions of the Act. Fines imposed under the Act must be paid into the State Revenue Fund, and orders imposing the pecuniary penalties have the effect of, and may be executed as they were, civil judgements granted by the High Court in favour of the Government of Namibia.

F. General provisions

43. The general provisions of the Act provide for (a) civil actions and jurisdictions; (b) prohibitions on disclosure of information; (c) disclosure of private interest by staff; (d) time within which investigation may be initiated; (e) limitation of liability; and (f) standard of proof.

G. Offences and penalties

44. Section 60 provides that a person commits an offence if that person hinders, opposes, obstructs or unduly influences any person who is exercising a power or performing a duty conferred or imposed on that person by the Act. It is also an offence under the Act to fail to comply with a summons issued by NaCC to attend before the Commission or, being in attendance, to refuse to take an oath or affirmation, to refuse to answer any question to which NaCC requires an answer or give false evidence or to fail to produce evidence that is required by NaCC, as well as to fail to comply with orders of the High Court given under the terms of the Act.

45. Other offences under section 63 of the Act include improperly influencing the NaCC concerning any matter connected with the exercise of any power or the performance of any function of the Commission, anticipating any decisions of the NaCC concerning an investigation in a way that is calculated to influence the proceedings of decision, doing anything in connection with an investigation that would constitute contempt of court had the proceedings occurred in a court of law and knowingly providing false information to the Commission.

46. Penalties for committing the offences are provided for under section 64 of the Act, and are in the form of monetary penalties and/or imprisonment. Monetary penalties range from NS\$20,000 to NS\$500,000, and imprisonment ranges from periods not exceeding one year to not exceeding 10 years.

H. Application of the Act and other legislation relating to competition

47. Chapter 8 of the Act deals with the important issue of the relationship between the NaCC and those sector regulators in Namibia that have jurisdiction over competition matters related to restrictive business practices and mergers in their sectors. Provision is made that the Commission and the sector regulators that have competition functions must negotiate and conclude concurrent jurisdiction agreements to coordinate and harmonize the

exercise of jurisdiction over competition matters within the regulated sectors and to secure the consistent application of the Competition Act.

III. Other relevant laws

A. Sector regulation

48. Namibia has a number of sector regulators in key sectors, such as the financial services sector (the Bank of Namibia (BoN) and the Namibia Financial Institutions Supervisory Authority (NAMFISA)), the communications services sector (the Communications Regulatory Authority of Namibia (CRAN)), the regulation of ports (the Namibian Port Authority (NAMPORT)) and the distribution of electricity (the Electricity Control Board (ECB)), with some having competition functions in their respective sectors.

49. BoN, CRAN and ECB have clear overlaps with NaCC on competition in the regulated sectors. While the enabling Acts of NAMFISA and NAMPORT do not give the sector regulators specific competition mandates, NaCC correctly noted that situations can arise which create overlaps between the functions of agencies and those of NaCC that make it difficult for them to carry out their respective mandates.

50. As at the time of the fact-finding visit, the NaCC had negotiated and concluded cooperation agreements with four sector regulators (CRAN, BoN, ECB and NAMPORT). It had also concluded an agreement with the Anti-Corruption Commission on bid-rigging and collusive tendering. The agreements with CRAN, BoN and ECB are in the form of memorandums of agreement on concurrent jurisdiction over competition in the regulated sectors, while that with NAMPORT is in the form of a memorandum of understanding.

51. The cooperation agreement between NaCC and CRAN was reportedly working very well, even though its provisions on confidentiality and use of information prevent the exchange of pertinent information on the business transactions under scrutiny. The agreement with BoN was said to be dormant, while that with the ECB was still in its infancy. The agreement with NAMPORT had not been effective because of the dual role of that organization of being both regulator and market player.

B. Consumer protection

52. While Namibia has an enforceable competition law and is in the process of formulating a comprehensive competition policy, it still does not have such a law and policy related to consumer protection. A consultant was assigned by the Ministry of Trade and Industry the task of looking at the formulation of a consumer protection policy first and then the law, but the process was said to be taking too long. The Law Reform and Development Commission had therefore taken it upon itself to spearhead the drafting of the law.

53. The Law Reform and Development Commission, in its discussion paper on the consumer protection project, noted that economic efficiency has traditionally been the key aim of competition policy and law, and that the effective enforcement of competition law contributes to the efficient and equitable functioning of a progressive market economy that in the long-term results in producer benefit and consumer welfare. The relevance of competition policy to consumer protection regulation therefore is linked to the optimization of consumer welfare through the application of competition policy.

54. It was therefore correctly inferred in the Law Reform and Development Commission's discussion paper that competition law in Namibia provides for consumer

protection through action against collusion, price fixing, abuse of a dominant position or restrictive business practices, and that this denotes positive outcomes for consumers. It was however cautioned that it would be wrong to treat competition policy and law as a panacea that would automatically serve consumer interests.

C. Intellectual property

55. The Competition Act, 2003, of Namibia recognizes intellectual property rights in its exemption of certain restrictive practices. Section 30 of the Act provides that the NaCC may, upon application, and on such conditions as the Commission may determine, grant an exemption in relation to any agreement or practice relating to the exercise of any right or interest acquired or protected in terms of any law relating to copyright, patents, designs, trademarks, plant varieties or any other intellectual property rights.

56. Namibia has an Industrial Property Act, 2012, which has the object "to provide for the establishment of an Industrial Property Office and the appointment of a Registrar of industrial property; to provide for the grant, protection and administration of patents and utility model certificates; to provide for the registration, protection and administration of industrial designs; to provide for the registration, protection and administration of trademarks, collective marks, certification marks and trade names; to provide for the registration of industrial property agents; to provide for the establishment of an Industrial Property Tribunal; and to provide for incidental matters".

57. A Business and Intellectual Property Authority Act is in the process of being enacted by Parliament. The relevant bill under consideration aims at establishing the Business and Intellectual Property Authority. The NaCC intends to conclude a cooperation agreement with the Business and Intellectual Property Authority when the Authority becomes fully operational.

58. At the Subregional Workshop on Intellectual Property and Competition Policy for Certain African Countries, held in Harare, Zimbabwe, in November 2013 under the auspices of ARIPO and WIPO, recommendations were made on various aspects concerning the interface between the protection of intellectual property and the enforcement of competition and/or consumer protection rules, which are pertinent to the situation in Namibia.

IV. Institutional Framework

59. The Competition Act, 2003, provides for a number of institutions in the enforcement of the country's competition law. These are (a) the NaCC; (b) the Minister of Trade and Industry; and (c) the High Court of Namibia.

A. Namibian Competition Commission

60. The NaCC has many powers and duties under the Act, including powers to make rules, to make determinations on applications for exemptions of certain restrictive practices, to make decisions on the infringement of part I prohibitions on restrictive agreements, practices and decisions and part II prohibitions on abuse of a dominant position, to institute proceedings in the High Court against undertakings for remedial orders, to make application to the High Court for interim orders restraining undertakings from engaging in potentially damaging conduct pending conclusion of the matter, to enter into agreements of settlement (consent agreements) with concerned undertakings setting out the terms to be

submitted to the High Court for confirmation as orders of the Court and to make determinations on proposed mergers and acquisitions.

61. Being a non-commercial statutory body, the NaCC is largely dependent on the Government for the funding of its operations. Section 17(1) of the Competition Act, 2003, provides that the NaCC funds consist of money appropriated by Parliament for the purposes of the Commission, fees payable to NaCC under the terms of the Act, money vesting in or accruing to NaCC from any other source and interest derived from the investment of funds of the Commission.

62. During the NaCC 2012/13 financial year, which ended on 31 March 2013, its sources of funding were (a) government grants (77 per cent); (b) filing fees (mergers) (18 per cent); (c) investment interest (4 per cent); and other income (exemption fees, profit on sale of vehicle, sundry income, etc.) (1 per cent). The trend continued into the 2013/14 financial year, during which NaCC revenue in the first six months ended on 30 September 2013, totalling N\$15,832,728, and consisted of (a) government grants, N\$12,000,000 (75.8 per cent); (b) rendering of services, N\$3,230,190 (20.4 per cent); (c) penalties received, N\$100,000 (0.6 per cent); and (d) investment revenue, N\$502,538 (3.2 per cent).

63. While the NaCC is currently in a sound financial position from its present sources of funding, experiences of other competition authorities in the region show that heavy dependency and reliance on government funding inhibits operational expansion.

64. The NaCC has two operational arms: (a) a Board of Commissioners of part-time members; and (b) a secretariat of full-time professionals. The Board of Commissioners consists of a chairperson and not less than two or more than four members, who are all appointed by the Minister. Members of the Board must have expertise in industry, commerce, economics, law, accountancy, public administration or consumer affairs and hold office for terms of three years. The current Board has a full membership of five Commissioners, who all possess the requisite qualifications and experiences.

65. The secretariat of NaCC is headed by the Secretary to the Commission, who is appointed under the terms of section 13(1) of the Act as the NaCC Chief Executive Officer responsible for the formation and development of an efficient administration and for the organization, control, management and discipline of the staff of the Commission. Other members of the secretariat include inspectors who are recruited for the purposes of investigating restrictive business practices and mergers and acquisitions.

66. The NaCC is basically a quasi-judicial body with investigative and limited adjudicative functions. The Act however does not clearly apportion NaCC's investigative and adjudicative functions between its secretariat and Board of Commissioners. It does not lucidly define when and what sort of actions should be taken by the secretariat and by the Board of Commissioners in the handling of competition cases due to the term "Commission" referring to both the Board and the secretariat.

67. It is however inferred in the Act that the secretariat is the NaCC investigative arm. Section 14(1) of the Act provides for the designation of any of the Commission's employees as inspectors for the purposes of investigating restrictive business practices and examining mergers and acquisitions. It has also become established practice in NaCC that the secretariat investigates competition cases and submits reports on the findings to the Board of Commissioners for determination.

B. Minister of Trade and Industry

68. The Minister of Trade and Industry reviews decisions of the NaCC on mergers and acquisitions. The review can however only be undertaken upon application by a party to the merger, which should be made within 30 days following the gazetting of an NaCC decision.

C. High Court of Namibia

69. Under the terms of section 52 of the Act, the High Court of Namibia has jurisdiction to hear and determine any matter arising from proceedings instituted in terms of the Act. The Court has the sole responsibility under the terms of section 53 of the Act of imposing pecuniary penalties for breach of the provisions of the Act.

V. Staffing and human resources

70. As at the time of the fact-finding visit, the NaCC had a staff complement of 28 employees, of which 23 were professional staff, 4 administrative support staff and 1 unskilled labourer. The staff however consisted of a total of 40 positions, and plans are to grow the establishment to 45 positions during the next five years. Staff turnover in the Commission is very low, with only three terminations of service since its inception in 2009.

71. NaCC employees are organized into four divisions, in addition to the Office of the Chief Executive Officer and Secretary to the Commission: (a) the Corporate Services Division; (b) the Mergers and Acquisitions Division; (c) the Restrictive Business Practices Division; and (iv) the Economics and Sector Research Division. All NaCC professional staff are adequately qualified for their positions and have university degrees in their respective areas of competences (i.e., economics, law, administration and accounts). The mix of economists and lawyers for the effective implementation and enforcement of competition policy and law is also adequate, with 11 economists in position and 7 lawyers.

72. The NaCC has a staff development programme under which it assists employees in advancing their academic and professional qualifications and experiences. The programme not only involves sponsorship in university courses on competition law and policy, but also on-the-job training for competition case investigation and analysis, attendance and participation at various international competition events and regional training workshops on competition and consumer policy and law. Tailor-made training on competition law and practice for professional staff is also arranged.

VI. Competition law enforcement

73. At the time of the fact-finding visit, the NaCC had handled over 291 competition cases and market investigations since its effective coming into operation in 2009. Of these competition cases, 234 were mergers and acquisitions, 54 involved restrictive business practices, including exemptions, and 3 were market investigations.

<i>Case category</i>	2009	2010	2011	2012	2013*	Total
Mergers and acquisitions	11	26	62	94	41	234
Restrictive business practices	4	14	15	11	10	54
Market investigations	0	0	0	0	3	3
Totals	15	40	77	105	54	291

* To October.

A. Mergers and acquisitions

74. Of the 234 cases of mergers and acquisitions that were received and handled by NaCC since 2009, 206 cases were approved unconditionally (constituting 88.03 per cent of total cases), 20 cases (8.55 per cent) were approved with conditions, 3 cases were prohibited (1.28 per cent), 1 case was not challenged (0.43 per cent), and 4 cases were withdrawn by the merging parties (1.71 per cent).

75. Two landmark mergers that were examined by NaCC, and illustrated NaCC's application of the merger control provisions of the Act, were the Seesa Namibia/RTZ Zelpy and Others merger and the Wal-Mart/Massmart merger. The Seesa Namibia/RTZ Zelpy and Others merger was not only the first notifiable merger under the Act to be examined and determined by the Commission, it was also the first such transaction to be determined following the holding of a stakeholder conference under the terms of section 46 of the Act. It also led to the conclusion of NaCC's first competition compliance programme and agreement with a business undertaking. The Wal-Mart/Massmart merger showed NaCC's application of the public interest provisions of the Act in its examination and determination of mergers. It also fully taxed the Commission's reaction abilities and capabilities since its decision was challenged by one of the world's most powerful corporations.

76. Many of the stakeholders consulted indicated their satisfaction with NaCC's handling of mergers and acquisitions, which was felt to be facilitative of business in terms of fees paid, examination time and level of consultation. The determinations on mergers by NaCC were also mostly accepted.

B. Restrictive business practices

77. Of the 54 cases involving restrictive business practices that have been received and handled by NaCC since 2009, 16 were requests for advisory opinions, mostly on the application of the provisions of the Act, which were given. Only one such case turned into a competition investigation. The rest of the cases were complaints received (31 cases), investigations initiated (5 cases) and exemption applications (2 cases).

78. A number of the cases handled (totalling 13) were closed for various reasons, including lack of jurisdiction and withdrawal by the complainants. Most of the cases (24) were still being investigated by the time of the fact-finding visit. NaCC had however not found a contravention of the provisions of the Act on anti-competitive agreements or abuse of dominance.

79. Stakeholder concerns were expressed over the length of time it was taking NaCC to complete investigations on restrictive business practices and take the necessary remedial action. One case involving an exemption application was still outstanding more than four years after submission of the application. The time spent on the investigation of other cases of restrictive business practices that were still active by the time of the fact-finding visit ranged from three months to more than three years and six months.

80. Stakeholders were also concerned that NaCC had still not found a contravention from its investigations into restrictive business practices, given the prevalence of such practices in Namibia, particularly concerning price-fixing arrangements.

C. Enforcement challenges

81. While most of the stakeholders consulted were generally satisfied with NaCC's enforcement of the Act's merger control provisions, many showed dissatisfaction with its

enforcement of the restrictive business practices provisions. Sentiments were also expressed that the Commission seems to be concentrating more on mergers and acquisitions than on restrictive business practices.

82. Capacity-building in the NaCC Restrictive Business Practices Division could improve the Commission's enforcement of the restrictive business practices provisions of the Act by increasing the Division's confidence in making well-analysed competition recommendations that withstand legal challenges.

83. The NaCC Economics and Sector Research Division, which commenced operations in late 2012 as a technical and policy unit, has also become an important competition operational division, with its own core functions of market enquiries and price monitoring. The market enquiries activities of the Division can be used to identify competition concerns in various sectors and industries for follow-up by the NaCC Restrictive Business Practices Division and/or the Mergers and Acquisitions Division.

84. The price monitoring and surveillance activities of NaCC are at the request of the Ministry of Trade and Industry and are not specifically provided for in the Act. The Ministry advised that in requesting NaCC to get involved in price monitoring activities, the intention is not to turn NaCC into a price control agency but merely to get NaCC's opinion on the matter to assist the Ministry in its decision-making processes, particularly on products that are being subsidized by the State.

VII. Other relevant issues

85. The other relevant issues that were reviewed were (a) advocacy and awareness of NaCC's operations and activities; (b) competition courses at Namibian universities and other institutions of higher learning; (c) the annual report; and (d) NaCC's office accommodation.

A. Advocacy and awareness

86. The visibility of NaCC is fairly good, with most of the business undertakings in both the private and public sectors of the economy aware of the existence of the Commission. NaCC is aiming to reach out to schools and colleges to bring awareness of its operations to the students who will grow up to be businesspersons. NaCC is also engaging with the University of Namibia through giving lectures on competition policy and law.

87. NaCC in 2012 started publishing and distributing its newsletter, the *NaCC Competition News*, as a quarterly publication. The newsletter is targeted at the business community and the Commission's other stakeholders in both the private and public sectors of the economy. The recipients of the newsletter also include schools, the national library and other competition authorities. NaCC is also venturing into publicizing itself through radio, to complement what it is already doing on television, since radio programmes are particularly aimed at rural areas.

B. Competition courses at universities

88. Namibia has a number of institutions of higher learning, comprising universities and polytechnics. However, none of the institutions currently offers full-time courses on competition policy and law. The Polytechnic of Namibia and the University of Namibia expressed interest in introducing competition policy and law courses, subject to securing the relevant funding.

C. Annual report

89. At the time of the fact-finding visit, NaCC had not submitted to the Minister of Trade and Industry, in accordance with the provisions of section 21 of the Act, any consolidated annual reports since the commencement of its operations in 2009 because of operational constraints. The annual financial statements were however ready and up to date, having been audited by the Office of the Auditor-General. It was only the activity part of the annual report that was outstanding, and the process of its finalization was under way.

D. Office accommodation

90. NaCC has offices in a modern office and shop complex building situated in the Windhoek central business district along the main Independence Avenue. The offices are on the building's mezzanine floor and easily accessible. While the office space is adequate for NaCC's operations, it will not accommodate the envisaged growth in the staff establishment to 45 employees.

91. NaCC's library is small and mainly contains publications on competition policy and law produced by organizations such as UNCTAD, the Organization for Economic Cooperation and Development, the International Competition Network and the European Commission. Very few academic books on the relevant subjects of economics and law were seen in the library for reference purposes. While the Internet is increasingly being used for accessing research material, a well-stocked reference library is still required.

VIII. Findings and recommendations

92. Namibia has a fairly good competition law as enshrined in the Competition Act, 2003. The law not only covers the three major competition concerns of anti-competitive agreements, abuse of dominance, and anti-competitive mergers, it also takes into account the special requirements of the country's economy, which are the protection and promotion of small undertakings, particularly those owned or controlled by persons who have been subject to past discriminatory laws or practices and thereby disadvantaged socially, economically or educationally.

93. Recommendations on those issues that need to be addressed or improved are however summarized below:

I. Recommendations concerning the Competition Act, 2003

#	Recommendation	To whom directed
1	The term "relevant market" should be defined under section 1 of the Act to give a clear guideline on the identification of markets under competition investigations.	NaCC/MTI/ Legislature
2	The common competition terms that are not defined in the Act, such as "dominant position", "essential facility", "negative clearance", and "statutory monopoly", should be defined under section 1 of the Act in line with international best practices.	NaCC/ MTI/ Legislature
3	Section 3(3) of the Act should be amended to remove the exemption from the application of the Act of those activities of statutory bodies that are authorized by any law. Alternatively, the whole of section 3(3) of the Act could be deleted since statutory bodies can be covered under section 3(2) which deals with the applicability of the	NaCC/ MTI/ Legislature

#	Recommendation	To whom directed
	Act to the State.	
4	The exercise of the Minister's exemption powers under section 3(1)(c) of the Act should be subject to clear statutory guidelines aimed at meeting public interest objectives of a socioeconomic nature as provided for in the Constitution of Namibia.	MTI
5	There should be a clear distinction in the Act between horizontal and vertical agreements that are anti-competitive, and their treatment as either per se prohibited offences or those considered using a rule of reason approach. The terms "horizontal agreement" and "vertical agreement" should also be defined in the relevant part of the Act to which the terms apply, i.e. part I of chapter 3 on restrictive agreements, practices and decisions.	NaCC/ MTI/ Legislature
6	The term "excessive pricing" should be defined in chapter 3 of the Act on restrictive business practices, and the price regulation remedy of excessive pricing should be clearly linked to the elimination of the responsible restrictive business practice.	NaCC/ MTI/ Legislature
7	Those restrictive business practices that seriously affect competition, such as anti-competitive horizontal agreements of a hard-core cartel nature and abuse of a dominant position, should not be eligible for exemption from the provisions of part I and part II of chapter 3 of the Act.	NaCC/ MTI/ Legislature
8	A clearer definition of the term "merger" should be found to meet the concerns of stakeholders. In that regard, consideration could be given to adopting the definition in the UNCTAD Model Law on Competition, which is that "'mergers and acquisitions' refers to situations where there is a legal operation between two or more enterprises whereby firms legally unify ownership of assets formerly subject to separate control. Those situations include takeovers, concentrative joint ventures and other acquisitions of control such as interlocking directorates".	NaCC/ MTI/ Legislature
II. Recommendations concerning merger control		
9	The merger notification thresholds that were gazetted in December 2012 should be reviewed upwards to ensure that they serve their intended purpose of screening those transactions that do not cause serious competition concerns.	NaCC/ MTI
10	The provisions of section 47(2) of the Act, which outlines specific factors that have to be taken into account by NaCC in determining mergers, should be extended to section 49 of the Act that gives the Minister powers to review NaCC decisions on mergers.	MTI
III. Recommendations concerning control and prevention of restrictive business practices		
11	The Act, or the Rules made under the Act, should have provisions on the maximum periods that NaCC should spend in investigating restrictive business practices and considering applications for exemption, as is the case with the examination of mergers and acquisitions.	NaCC/ MTI/ Legislature

#	Recommendation	To whom directed
12	The investigative and analytical capacity of staff members of the Commission's Restrictive Business Practices Division should be further developed to speed up the handling of competition cases and build confidence in the Division in making recommendations on restrictive business practices that withstand challenges.	NaCC
13	NaCC should give equal concentration to restrictive business practices and mergers and acquisitions, which are its core operations, in the form of policy, strategic and operational direction.	NaCC
14	NaCC's draft corporate leniency rules should be approved by the relevant government authorities as a matter of urgency, and corporate leniency programmes should be provided for in the Competition Act, 2003, as a statutory requirement.	Attorney General's Office/NaCC/MTI/Legislature
IV. Recommendations concerning markets investigations and industry surveillance		
15	NaCC's "unofficial" function of price monitoring and surveillance should be formalized in the Competition Act, 2003, with clear guidelines on its carrying out to avoid conflicts with the basic independent operation principle of competition.	NaCC/MTI/Legislature
V. Recommendations concerning relations with sector regulators		
16	The exchange of confidential information between NaCC and those sector regulators that have competition functions should be provided for in the relevant enabling Acts.	NaCC/Sector regulators/Legislature
VI. Recommendations concerning institutional issues		
17	In appointing members to the Board of Commissioners, the Minister should ensure that not more than one member is retired at the same time for effective decision-making continuity.	MTI
18	The separation of NaCC's investigative and adjudicative functions should be clearly provided for in the Act, with the secretariat being formally given statutory investigative functions and the Board of Commissioners retaining the adjudicative functions, with well-defined responsibilities and spheres of operation.	NaCC/ MTI/ Legislature
19	NaCC should identify alternative sources of funding for its operations, subject to the provisions of section 17(1) of the Act.	NaCC
20	NaCC should adequately resource all its divisions in terms of human resources by filling the vacant posts and recruiting more staff in the Corporate Communications Section of the Corporate Services Division, the Mergers and Acquisitions Division and the Economics and Sector Research Division, as well as recruiting more economists at senior levels in the Restrictive Business Practices Division.	NaCC

#	Recommendation	To whom directed
21	NaCC should continue with, and further develop, its staff training programme to include study tours of more developed competition authorities and staff exchanges with other authorities in the region.	NaCC
22	NaCC should expedite the drafting of its inaugural annual report, covering all the years of its operations, and ensure that future reports are drafted and submitted to the Minister of Trade and Industry within the time scales stipulated in section 21 of the Act.	NaCC

VII. Recommendations concerning consumer protection

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| 23 | The process towards the formulation and enactment of a consumer protection policy and law in Namibia should be sped up, with serious consideration being given to having NaCC being the primary implementer and enforcer of that policy and law. | MTI |
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VIII. Recommendations concerning the interface between competition and intellectual property laws

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| 24 | NaCC should involve itself in international events on the important interface between the protection of intellectual property and the enforcement of competition and/or consumer protection law, and should seriously consider implementing the recommendations made at the ARIPO/WIPO subregional workshop on intellectual property and competition policy that was held in Harare, Zimbabwe, in November 2013. | NaCC |
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IX. Recommendations concerning other relevant issues

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| 25 | Funding should be found for the introduction of full-time courses on competition policy and law at either or both the University of Namibia and Polytechnic of Namibia | Cooperating partners |
| 26 | NaCC should be given financial assistance in the stocking of its library with relevant reference books on subjects dealing with competition policy and law. | Cooperating partners |
| 27 | NaCC should be given technical and financial assistance in the following identified areas, some of which require expert studies: (a) revision of the Competition Act and the rules; (b) consumer protection policy and law, and NaCC's role in the implementation of that policy and enforcement of the law; (c) the roles of the NaCC's Board and Commissioners and secretariat, and (d) capacity-building and staff training and development, particularly in enforcement. | Cooperating partners |

* MTI, Ministry of Trade and Industry.